Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

PARAGON PROPERTIES COMPANY,

Petitioner,

-vs-

CITY OF NOVI,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Michigan

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where Respondent's legislative body unconditionally denies Petitioner's request to amend a zoning ordinance as applied to Petitioner's property, should Petitioner be required to take the additional step of pursuing a use variance from the legislative body's own appointed body before Petitioner's taking claim under the Fifth Amendment and its substantive due process claim under the Fourteenth Amendment are ripe for judicial review?

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CITATIONS TO OPINIONS BELOW

The decision of the Michigan Supreme Court was filed July 23, 1996, and is reported at 452 Mich. 568 (1996). The order of the Michigan Supreme Court denying rehearing was filed on October 7, 1996 and reported at 453 Mich. 1215 (1996). The decision of the Michigan Court of Appeals was filed on April 7, 1994, and reported at 206 Mich. App. 74 (1994). Copies of all these opinions are included in the Appendix to this Petition.

JURISDICTION

The decision of the Michigan Supreme Court was entered on July 23, 1996. Appendix A. The order of the Michigan Supreme Court denying rehearing was entered on October 7, 1996. Appendix C. The Petition For Writ Of Certiorari is timely filed in accordance with Rule 13.3 of the Rules of this Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V, provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV, § 1, provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress.

Relevant portions of the Michigan City Or Village Zoning Act are excerpted in Appendix G.

STATEMENT OF THE CASE

A. The City Council Unconditionally Denies Paragon's Request To Rezone The Property.

Petitioner Paragon Properties Company ("Paragon") is the fee holder of approximately seventy-five (75) acres of vacant land (the "Property") located in the City of Novi (the "City"). In 1984, the City Zoning Ordinance restricted portions of the City, including the area where the Property is located, to large lot single family residential use.

On May 21, 1984, Paragon submitted a request to the Novi City Council (the "City Council") to rezone the Property from RA and R1 large lot single family residential zoning to MH (mobile home) District Zone. The legislative authority to enact or amend a zoning ordinance is vested exclusively with the City Council under the Michigan City Or Village Zoning Act.[1] After securing a report from the City's Planning Commission and conducting the public hearings mandated by law,[2] the City Council unconditionally denied the request for rezoning in September, 1984.[3]

Paragon then filed an action against the City in the Oakland County Circuit Court on January 11, 1985. That lawsuit was ultimately dismissed without prejudice on February 8, 1989. At that time, the parties were engaged in further discussions to rezone the Property as requested by Paragon, but the City Council ultimately refused. The availability of a use variance from the City's Zoning Board of Appeals (the "ZBA") was never discussed between representatives of Paragon and the City.

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[1] MCL 125.584; MSA 5.2934. See App. G.

[2] See MCL 125.584(3); MSA 5.2934(3) at G-2.

[3] In denying Paragon's request, the City relied on the recommendation of its planning consultants, who opposed the rezoning because it would be inconsistent with the City's Master Plan.

B. Paragon Files A Taking Claim And A Claim For Substantive Due Process And Equal Protection Violations.

On June 5, 1989, Paragon filed a Complaint against the City in Oakland County Circuit Court. Paragon complained that the City's application of the zoning ordinance to the property, including its refusal to amend the ordinance, constituted a deprivation of Paragon's substantive due process and equal protection rights under the Fourteenth Amendment. In addition, Paragon alleged that the City's actions constituted a taking without just compensation, pursuant to both the Michigan Constitution and the Fifth and Fourteenth Amendments to the United States Constitutions.[4]

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[4] In its Complaint, reprinted in App. D, Paragon alleged, *inter alia*, that:

> "The Property is unsuited and is not usable for any of the purposes which are currently permitted by the zoning ordinance[;]" (Complaint ¶ 13)
>
> "the exclusion of the use of said Property as a mobile home site bears no reasonable relationship to the public health, safety or general welfare[;]" (Complaint ¶ 15)
>
> "the Property as located could be successfully used and developed for mobile home purposes for which there is currently an immediate economic demand[;]" (Complaint ¶ 17)
>
> "[a]s applied to the Property of Plaintiff, the zoning ordinance of the City of Novi is unreasonable, confiscatory, discriminatory, and it is unconstitutional and has deprived Plaintiff of its property in violation of the Due Process Clauses of the Constitutions of the State of Michigan and the

Pursuant to its substantive due process and equal protection claims, Paragon sought a Declaratory Judgment invalidating the zoning ordinance as applied to the Property and an injunction preventing the City from further interfering with Paragon's use of the Property as a mobile home park. See App. at D-8, ¶¶ A and B. Under its taking claim, Paragon sought monetary damages for the total deprivation of its Property without just compensation. See App. at D-8, ¶ C.

C. The Trial Court Denies The City's Motion For Partial Summary Disposition On Ripeness Grounds.

In February, 1990, the City filed a Motion For Partial Summary Disposition of Paragon's taking claim only and argued for the first time (nearly six years after the City Council denied Paragon's request for rezoning) that Paragon's taking claim was not ripe for judicial review because Paragon had not obtained a "final" decision from the City regarding its proposed use of the Property. The basis for the City's motion was the two-prong ripeness doctrine adopted by this Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

In *Williamson County*, this Court held that a regulatory taking claim under the Fifth Amendment is not ripe

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United States of America[;]" (Complaint ¶ 18) and "denies Plaintiff the reasonable use of its Property." (Complaint ¶ 23).

for judicial review until a landowner secures a final decision from the government's "initial decisionmaker" and has been denied just compensation through state inverse condemnation proceedings. *Id.* at 185-186. The Michigan Supreme Court incorporated and expanded the *Williamson County* ripeness doctrine into state land use proceedings in *Electro-Tech, Inc. v. H.F. Campbell Co.*, 433 Mich. 57, 445 N.W.2d 61 (1989), *cert. denied* 493 U.S. 1021 (1990). The City argued that because Paragon had not sought a use variance from the Novi ZBA, a "final" decision had not been made by the City, which meant Paragon's taking claim was unripe under *Williamson County*.

At the hearing on the City's Motion, the trial court ruled that the denial of Paragon's request for rezoning by the City Council was the final decision, from which Paragon could assert a ripe taking claim. An Order denying the City's Motion For Partial Summary Disposition was entered by the trial court on April 6, 1990.

D. The Trial Court Issues A Declaratory Judgment Invalidating The Ordinance As A Violation Of Paragon's Substantive Due Process Rights And Awards Taking Damages.

A bench trial commenced on July 5, 1990, after which the trial court made the following findings:

1. The Property will not percolate so as to support any of the City's alternate use suggestions under the present zoning.

2. Paragon has been deprived of all use of the Property by the present zoning.

3. The Property has no value other than its original purchase price as presently zoned.

4. The present zoning is confiscatory.

5. The present zoning is unreasonable.

6. The Property would be valuable if rezoned to permit Paragon's proposed reasonable use.

7. The zoning ordinance as applied to the Property is unconstitutional.

8. The zoning ordinance is contrary to the Master Plan of the City.

9. Thirty-five acres could have been developed as a mobile home park.

10. The thirty-five acres, as rezoned, would have a value of $12,000.00 per acre as of 1984. (See App. E).[5]

Judgment entered on August 30, 1990. The City thereafter filed a Motion For New Trial, in which it again argued that Paragon's Taking claim was not ripe because Paragon had failed to seek a use variance from the ZBA. The trial court again rejected the City's arguments, and tersely stated:

> I don't think the City itself ever felt that the zoning in this case was reasonable.

---

[5] Development of the Property as zoned was not economically feasible because, among other things, the Property is not served by a sewer system and the soil does not percolate. Because the cost of sewage disposal would be prohibitive, the Property had no value as zoned and, due to the unreasonable zoning, the Property had never been developed.

> I do think it was the City's unspoken intention . . . to hold this property in limbo and do what, in my judgment, they then perceived to be an unreasonable zone.
>
> They wanted to hold it in limbo toward the eventuality that it would one day be available to them to be incorporated into a package of an industrial park . . . which as I've said in my judgment, they could not have concluded themselves was reasonable. (See App. F).

E. The Court Of Appeals Reverses All Of Paragon's Claims For Lack Of Ripeness.

The City appealed as of right, and Paragon filed a Cross-Appeal. Among other issues raised on appeal, the City argued that the trial court erroneously ruled that Paragon's constitutional taking claim was ripe because Paragon had not sought a variance from the ZBA. In a published opinion, the Court of Appeals agreed and reversed the judgment of the trial court. *Paragon Properties Co. v. City of Novi*, 206 Mich. App. 74, 520 N.W.2d 344 (1994).

Although the Court reversed the entire judgment, including that portion which invalidated the zoning ordinance as a deprivation of Paragon's substantive due process rights, the Court's analysis focused exclusively upon Paragon's Just Compensation claim:

> Under Michigan law, the doctrine of finality requires a property owner to obtain a final decision from the governmental entity alleged to have unconstitutionally taken the property and also attempt to obtain just compensation

> through inverse condemnation. The purpose of the finality requirement is to ensure that there actually was a taking. *Electro-Tech, Inc* v *H F Campbell Co*, 433 Mich 57, 61; 445 NW2d 61 (1989), *cert den* 493 US 1021 (1990); *Lake Angelo Associates* v *White Lake Twp*, 198 Mich App 65; 498 NW2d 1 (1993). [App. B at B-3].

Paragon thereafter filed with the Michigan Supreme Court a timely Application For Leave To Appeal the decision of the Court of Appeals. In an Order dated September 20, 1995, the Michigan Supreme Court granted Paragon's Application. 450 Mich. 865 (1995).

F. The Michigan Supreme Court Affirms That Paragon Did Not Receive A Final Decision.

Paragon argued that the Court of Appeals erroneously applied the *Williamson County* ripeness doctrine, as adopted in *Electro-Tech*. Paragon maintained that, because the authority to perform the legislative function of rezoning property is exclusively vested with the City Council, the unconditional denial of Paragon's rezoning request constituted a final decision. Paragon further asserted that, in any event, the ripeness doctrine was inapplicable to Paragon's non-taking substantive due process claim under the Fourteenth Amendment, pursuant to which Paragon secured a Declaratory Judgment invalidating the ordinance. The Michigan Supreme Court disagreed and affirmed. See App. A.

In a 5-2 decision, the Court concluded that all of Paragon's constitutional claims (including not only the Just Compensation claim for damages, but also the substantive due process claim seeking invalidation of the

unreasonable zoning classification of the Property) were not ripe for adjudication because Paragon failed to secure a final decision from the City regarding the application of its zoning ordinance, relying on the two-prong ripeness test enunciated in *Williamson County*. The court opined that, although Paragon secured an unconditional decision regarding its rezoning request from the City Council, Paragon should have sought a use variance from the ZBA. Without this additional decision by the ZBA, the court reasoned that there would be no "information regarding the extent of the injury Paragon may have suffered as a result of the ordinance." See App. A at A-11. Because the Court found that Paragon failed to secure a final decision, the court declined to address the second prong of the *Williamson County* ripeness doctrine – whether Paragon pursued a state inverse condemnation claim.

For the reasons set forth below, Paragon's constitutional claims were ripe when the City Council denied Paragon's rezoning request. The decision by the Michigan Supreme Court deprives Paragon of its rights under the Fifth Amendment and the Fourteenth Amendment to the United States Constitution, is inconsistent with decisions of the Sixth and Eleventh Circuit Court of Appeals and contravenes established precedent from this Court.

REASONS FOR GRANTING THE WRIT

An indispensable element of subject matter jurisdiction in federal court is the existence of a case or controversy. U.S. Const. art. III. In order to effectuate this

limitation on federal court jurisdiction in land use proceedings in which the landowner alleges a regulatory taking, this Court adopted a two-prong ripeness test in *Williamson County*. The Court tailored this two-prong test specifically for Just Compensation claims, given the peculiar nature of the right protected by the Fifth Amendment. See *Williamson County*, 473 U.S. 172, 194 n.13.

Since the *Williamson County* decision, lower federal courts have struggled to apply the ripeness doctrine in a consistent fashion that maintains the limitation on federal court jurisdiction while protecting constitutionally mandated property rights. The confusion over the purpose and scope of the doctrine ultimately results in a deprivation of constitutionally protected property rights.[6] In recognition of the need to clarify the manner in which *Williamson County* is applied by federal courts, this Court recently granted a writ of certiorari to the Ninth Circuit Court of Appeals in *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359 (9th Cir. 1996), *cert. granted* 117 S.Ct. 293 (1996).

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[6] For a general discussion of these issues, see Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1 (1992); Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91 (1994); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVTL. L. 37 (1995); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1 (1995).

Unfortunately, state courts, including the Michigan Supreme Court, have exacerbated the problem by injecting the *Williamson County* ripeness doctrine into state land use jurisprudence. The primary objective of the ripeness doctrine (effectuating the limitation on subject matter jurisdiction in federal courts) is non-existent in state court proceedings.

In addition, the Michigan Supreme Court has expanded the application of the *Williamson County* ripeness doctrine to the extent that it now deprives landowners of federal constitutionally protected rights established by this Court. The decision is also directly contrary to the application of *Williamson County* by the Sixth and Eleventh Circuit Court of Appeals and by the Ohio Supreme Court. For these reasons, a writ of certiorari should be granted pursuant to Supreme Court Rule 10(b) and 10(c).

I.

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO CLARIFY THE SCOPE OF THE WILLIAMSON COUNTY RIPENESS DOCTRINE TO AVOID THE DEPRIVATION OF CONSTITUTIONAL RIGHTS OF LANDOWNERS AND TO RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW AND THE SIXTH AND ELEVENTH CIRCUIT COURT OF APPEALS.

A. The Michigan Supreme Court Erroneously Expanded The Application Of Williamson County To Paragon's Substantive Due Process Claim, Contrary To Decisions By The Sixth And Eleventh Circuit Court Of Appeals.

The Michigan Supreme Court affirmed the dismissal of all constitutional claims regarding which Paragon pursued and prevailed, including Paragon's non-taking substantive due process claim under the Fourteenth Amendment. The Court explained its reasoning as follows:

> A challenge to the validity of a zoning ordinance "as applied," whether analyzed under 42 USC 1983 as a denial of equal protection, as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment, is subject to the rule of finality. [See App. A at A-7].

By ruling that a landowner must first seek a use variance after the City Council denies a rezoning application, the Court below has eliminated the fundamental right to judicially challenge an arbitrary and capricious legislative decision as a violation of Fourteenth Amendment substantive due process rights.

Paragon's substantive due process claim challenged the constitutionality of the decision to deny rezoning by the City Council, the legislative body with exclusive authority to amend the zoning ordinance, on the ground that such decision was arbitrary and capricious[7] and bore no reasonable relationship to the public health, safety or general welfare. The Court's application of *Williamson County* to Paragon's arbitrary and capricious substantive due process claim, in which Paragon exclusively sought and secured non-monetary relief in the form of a Declaratory Judgment invalidating the zoning ordinance, is contrary to the decision by this Court in *Williamson County* and decisions by the Sixth and Eleventh Circuit Court of Appeals.

The ripeness test adopted by this Court in *Williamson County* is peculiar to damage claims under the Just Compensation Clause of the Fifth Amendment. The Court in *Williamson County* painstakingly explained that the two-prong test is tailored to *damage* claims under the Fifth Amendment, given the nature of the right protected:

> [B]ecause the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional

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[7] Although Paragon did not expressly use the phrase "arbitrary and capricious," the Complaint clearly alleged, and the trial court found, that such constitutional violation occurred by virtue of the "unreasonable" application of the zoning ordinance, which "bears no reasonable relationship to the public health, safety or general welfare." See App. D at ¶¶ 15 and 18 and App. E. *Black's Law Dictionary*, 5th ed., defines "arbitrary and capricious" as "willful and unreasonable action without consideration or in disregard of facts or without determining principle."

> right therefore requires that a property owner utilized procedures for obtaining compensation before bringing a § 1983 action. *Williamson County*, 473 U.S. at 194, n.13 (emphasis in original).

Because the landowner grounded his claim "under the Just Compensation Clause,"[8] the *Williamson County* Court opined that the landowner's claim was unripe.

In *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992), the City Council denied the landowner's rezoning application under Michigan law. The landowner sued the city, alleging that the denial of his rezoning request "was arbitrary and capricious, depriving him of substantive due process of law." *Id.* at 1214. The Sixth Circuit Court of Appeals succinctly articulated that the ripeness doctrine adopted by *Williamson County* is unique to taking claims in federal court:

> The rationale for these requirements in taking cases is that the federal court cannot know what has been taken or what compensation has been afforded until state remedies have been utilized. Until that time, the federal court cannot determine whether a taking has occurred, whether compensation is due, or, if it has been afforded, whether it is just. *Id.* at 1214-1215.

Because the ripeness doctrine is limited to taking claims in which just compensation is sought, the court held:

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[8] *Id.* at 186. Although the landowner had asserted substantive and procedural due process claims and a denial of equal protection, the trial court dismissed such claims on separate grounds and therefore the claims were not before the court. *Id.* at 182, n.4.

> "[T]he very existence of an allegedly unlawful zoning action, without more, makes a substantive due process claim ripe for federal adjudication. Plaintiff's claim is, therefore, ripe under the law now prevailing in this circuit." *Id.* at 1215 (footnote omitted).

Likewise, the Eleventh Circuit Court of Appeals unequivocally holds that the *Williamson County* ripeness doctrine is inapplicable to arbitrary and capricious substantive due process challenges to zoning decisions. In *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990), the court delineated the four (4) separate and distinct claims that may be advanced in challenging the constitutionality of land use regulation: "just compensation, due process takings, arbitrary and capricious due process, and equal protection claims." *Id.* at 720. The arbitrary and capricious substantive due process claim is premised on the argument that:

> The regulation is arbitrary and capricious, does not bear a substantial relation to the public health, safety, morals, or general welfare, and is therefore an invalid exercise of the police power. *Id.* at 721.

When a landowner asserts an arbitrary and capricious substantive due process challenge to the application of a zoning ordinance, the *Eide* court explained that the final decision prong of *Williamson County* is satisfied at the instant a rezoning request is denied:

> [W]ith respect to an as applied arbitrary and capricious due process claim, the final decision hurdle is satisfied when the first prong is met – i.e., when the zoning decision being challenged is finally applied to the property. Thus, in an as

> applied arbitrary and capricious due process claim challenging a zoning decision denying commercial zoning, the landowner need only obtain a final decision denying commercial zoning. [*Id.* at 725].

The *Eide* court further explained that the just compensation prong of the ripeness doctrine is inapplicable to arbitrary and capricious substantive due process claims:

> [A]n arbitrary and a capricious act by a government is unconstitutional even if the government pays just compensation. A property owner's rights are violated "the moment a governmental decision affecting his [or her] property has been made in an arbitrary and capricious manner, regardless of whether he [or she] is later compensated for that violation." *Id.* at 725-726, n.16 (quoting *Greenbriar v. City of Alabaster*, 881 F.2d 1570, 1574, n.8 [11th Cir. 1989]).

The *Eide* court concluded that the landowner's arbitrary and capricious substantive due process claim was unripe because he failed to submit "a petition to rezone his properties from their present residential zoning to commercial zoning." *Id.* at 726.

The City unconditionally denied Paragon's petition to rezone the Property. The decision by the court below is in direct conflict with the decisions by the Sixth Circuit in *Pearson* and the Eleventh Circuit in *Eide*.[9] The Petition For Writ Of Certiorari should be granted to resolve this conflict.

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[9] However, the Third Circuit Court of Appeals applied the *Williamson County* ripeness doctrine to substantive due process and equal protection claims in *Taylor Inv. Ltd. v. Upper Darby Twp.*, 983 F.2d 1285 (3rd Cir. 1993), *cert. denied* 510 U.S. 914

B. The Decision By The Michigan Supreme Court Deprives Paragon Of Its Right To Temporary Taking Damages, Contrary To The Fifth Amendment As Applied By This Court In First Lutheran Church.

The Michigan Supreme Court first adopted the *Williamson County* ripeness doctrine in its decision in *Electro-Tech, Inc. v. H.F. Campbell Co.*, 433 Mich 57, 445 NW2d 61 (1989), *cert. den.* 493 U.S. 1021 (1990). Relying on *Williamson County*, as adopted by *Electro-Tech.* the Michigan Supreme Court concluded below that the denial of the rezoning request by the City Council was not a "final decision" by the City because Paragon could have applied for, and secured, a use variance from the City's ZBA. The Court reasoned:

> The decision of the City council on the rezoning request in no way diminished the Zoning Board of Appeals' authority to grant a variance if Paragon pursued that alternative form of relief. Were the Zoning Board of Appeals to deny Paragon's request, relief in the form of an appeal to the circuit court is authorized by statute. MCL 125.585(11); MSA 5.2935(11). [App. at A-12 through A-13.]

The statutory scheme to which the Court refers delineates the scope of authority of a Zoning Board of Appeals

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(1993). Although Paragon submits that the decisions in *Pearson* and *Eide* most appropriately advance the objectives of the *Williamson County* ripeness doctrine, the mere fact that *Pearson* and *Eide* conflict with the Third Circuit opinion in *Taylor* further compels the conclusion that the Court should issue the Writ of Certiorari as requested by Paragon.

and a circuit court sitting on appeal from the ZBA decision. Under MCL 125.585(9); MSA 5.2935(9), a Zoning Board of Appeals may permit a specific use of land if there exists "practical difficulties or unnecessary hardship" from a strict application of the zoning ordinance. However, the statute does not authorize the Zoning Board of Appeals to award monetary damages under any circumstances. Although the court recognized that a landowner may appeal an adverse decision by the Zoning Board of Appeals to the Circuit Court, MCL 125.585(11); MSA 5.2935(11), the court failed to recognize the limited power of the circuit court sitting on appeal:

> As a result of the review required by this section, the Court may affirm, reverse, or modify the decision of the Board of Appeals. MCL 125.585(13); MSA 5.2935(13). [See App. G at G-5].

Thus, like the Zoning Board of Appeals, the circuit court is powerless to award any monetary damages to an aggrieved landowner who has been deprived of the use of his property.

By virtue of the Michigan Supreme Court's decision below, any person whose property cannot be developed under the existing zoning must first pursue a myriad of administrative appeals, including a variance application to the ZBA, and an appeal to the circuit court. The request could then be remanded to the ZBA for further proceedings,[10] appealed back to the circuit court, etc. – a

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[10] MCL 125.585(12); MSA 5.2935(12) provides:

> If the court finds the record of the Board of Appeals inadequate to make the review required by this

process that could take many months, even years. If a variance is ultimately granted, no further recourse is available, despite the fact that the owner has not been compensated for a total deprivation by the City Council of the use of his property during this lengthy appeal process. A landowner in this situation would never have a ripe taking claim, irrespective of the length of time during which the property is rendered useless. In this regard, the Michigan Supreme Court has completely eliminated a landowner's right to temporary taking damages under the Fifth Amendment to the United States Constitution.

The Fifth Amendment mandates that "private property [shall not] be taken for public use, without just compensation." U.S. Const., Amend. V.[11] Where the state regulates the use of land to the extent that the owner is deprived of all reasonable use of his property, this Court has long recognized such regulation as a taking. See, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

In *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987), this Court

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> section . . . the court shall order further proceedings before the Board of Appeals on conditions which the court considers proper. The Board of Appeals may modify its findings and decision as a result of the new proceedings, or may affirm the original decision. The supplementary record and decision shall be filed with the court. [See App. G at G-4].

[11] The "Taking" or "Just Compensation" Clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment, as declared by this Court in *Chicago, Burlington, & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

resolved any uncertainty that the Just Compensation Clause requires the government to pay compensation for all regulatory takings, including those that are merely temporary. In *First Lutheran Church*, the church owned several buildings located along the banks of a river. After a flood destroyed the buildings, the County of Los Angeles adopted an interim ordinance which prohibited reconstruction by the church. The church then sued the County in state court, including an inverse condemnation claim for damages on the basis that the ordinance denied all use of the church's property.

The trial court granted a motion to strike such allegation, on the ground that an ordinance which deprives a person of the total use of land could only be challenged in a declaratory relief or writ of mandamus action under California law, providing the landowner an alternative form of relief. *First Lutheran Church*, 482 U.S. at 308-309. The California Court of Appeals affirmed, on the ground that a property owner "may not recover damages until the ordinance is finally declared unconstitutional, and then only for any period after that declaration for which the county seeks to enforce it." *Id.* at 312.

On appeal, this Court reversed. *Id.* at 322. After concluding that temporary takings "are not different in kind from permanent takings," Chief Justice Rehnquist, writing for the Court, explained that the landowner is entitled to compensation for the period of time during which the property owner is subject to the unconstitutional regulation:

> Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a "temporary" one, is not

> a sufficient remedy to meet the demands of the Just Compensation Clause. *Id.* at 319.

Once the government has subjected the landowner to an unconstitutional regulation of the use of the property, *First Lutheran Church* mandates that just compensation be paid:

> We . . . hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. *Id.* at 321.

The decision below departs from *First Lutheran Church* and eliminates a landowner's right to compensation for temporary takings under the Fifth Amendment. Paragon alleged, and the trial court found, that a taking of Paragon's property had occurred when the City Council refused to grant the rezoning request. The Michigan Supreme Court held that Paragon should have pursued an "alternative form of relief" from the burdens of the ordinance. Such a decision is indistinguishable from the California scheme struck down in *First Lutheran Church.* The Michigan Supreme Court's improper expansion of the *Williamson County* ripeness doctrine swallows a landowner's rights to temporary taking damages under the Fifth Amendment. This Court should issue the Writ to correct the erroneous expansion of *Williamson County* and to provide guidance for all State and Federal Courts that are frequently confronted with this issue.

II.

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG STATE COURTS REGARDING THE ISSUE WHETHER A LANDOWNER'S JUST COMPENSATION AND SUBSTANTIVE DUE PROCESS CLAIMS ARE RIPE WHEN THE LEGISLATIVE GOVERNMENTAL ENTITY UNCONDITIONALLY DENIES A REZONING APPLICATION.

The Michigan Supreme Court concluded that Paragon's constitutional claims were not ripe for judicial review because Paragon failed to pursue a use variance from the zoning board of appeals. The court reasoned:

> The City of Novi's denial of Paragon's rezoning request is not a final decision because, absent a request for a variance, there is no information regarding the potential uses of the property that might have been permitted, nor, therefore, is there information regarding the extent of the injury Paragon may have suffered as a result of the ordinance. [App. A at A-11 (footnote omitted)].

This erroneous application of the *Williamson County* ripeness doctrine was expressly rejected by the Ohio Supreme Court in its unanimous opinion in *Karches v. City of Cincinnati*, 38 Ohio St.3d 12, 526 N.E.2d 1350 (1988).

In *Karches*, the landowners petitioned the Cincinnati city council to rezone their property. *Karches*, 526 N.E.2d at 1352. The city council denied the rezoning request. *Id.* Like Paragon, the *Karches* landowners *did not seek a variance from the ZBA*; rather, they filed a lawsuit against the

city "alleging that the RF-1 zoning ordinance was unconstitutional as applied to their property and was a taking of their property requiring just compensation." *Id.*[12]

Following a bench trial, the trial court declared that the RF-1 zoning ordinance as applied to the property in question was unconstitutional. Specifically, the trial court found:

> [T]he existing RF-1 zoning, as applied to appellants' properties, was unreasonable, arbitrary and confiscatory; had no substantial relationship to the public health, safety or general welfare; [and] substantially interfered with appellants' right to use their properties in an economically feasible manner. [*Id.* at 1353].[13]

The Ohio Court of Appeals reversed. Relying on the ripeness doctrine set forth in *Williamson County*, the Court

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[12] The allegations in the complaint in *Karches* are identical to the allegations contained in Paragon's Complaint. The property owners in *Karches* complained "that the RF-1 zoning precluded them from developing their properties in an economical manner . . . that the RF-1 zoning, as applied to their specific properties, had no reasonable relation to the public health, safety and welfare; was arbitrary, discriminatory and unreasonable; and, therefore, deprived them of their properties without due process of law in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States and . . . the Ohio Constitution. Plaintiffs sought declaratory relief . . . and permanent injunctive and other relief." *Id.* at 1352-1353. (Compare ¶¶ 13, 15 and 18 of Paragon's Complaint, App. D).

[13] Likewise, the trial court in the case at bar found that "the present zoning is confiscatory, as well as unreasonable . . . [and] that the zoning ordinance as it applies to [Paragon's] land is unconstitutional." See App. E.

of Appeals held that the challenge to the constitutionality of the RF-1 zoning ordinance "was not ripe for judicial review 'because the City had not reached a final decision regarding the application of the zoning regulations to the [property in question].' " *Id.* at 1353. The Court of Appeals opined that the property owners could have petitioned for a change in zoning on the basis of a specific proposed use or applied for a building permit. *Id.* at 1354. Therefore, the court reasoned, "without a refusal by the city *to allow a specific use*, no final definitive position had been taken by the city." *Id.* (emphasis in original).

The Ohio Supreme Court in *Karches* reversed and ***unanimously*** held that the property owners' challenge to the constitutionality of the RF-1 zoning ordinance was ripe for judicial determination. *Id.* at 1357. On facts identical to the case at bar, the *Karches* Court found that the property owners had satisfied the *Williamson County* finality requirement:

> [A]ppellants alleged that their properties could not be developed in a reasonably beneficial manner within the confines of the RF-1 ordinance. They petitioned the city for a change in use, which the city denied. . . . Appellants have shown that the city has taken a definitive position on the zoning issue – a position which inflicts a concrete injury. [*Id.* at 1355].

Significantly, the *Karches* Court expressly rejected any suggestion that a property owner must first submit proposed alternative uses to the city, e.g., a request to the ZBA for a variance to build a mobile home park. "Denial by the city of a specific proposed use is not necessary to a

finding that the city has taken a final definitive position sufficient to satisfy the test of ripeness." *Id.* at 1354.[14]

The Novi City Council, the legislative body vested with exclusive authority to amend zoning ordinances, reached a final, definitive position regarding Paragon's rezoning application. In light of its opinion in *Karches*, the Ohio Supreme Court would have unanimously found that Paragon's constitutional claims were ripe, consistent with the decision in *Williamson County*. This Court should grant the Petition For Writ Of Certiorari to resolve the conflict among these highest State Courts.

CONCLUSION

Paragon Properties Company received a final, definitive decision regarding its application for rezoning from the Novi City Council. If Paragon desired to invalidate the zoning ordinance on constitutional grounds, its only recourse was to file a lawsuit challenging the City Council's action as a deprivation of substantive due process or equal protection under the Fourteenth Amendment. It was under no obligation to seek a variance for a specific use, given that its challenge was to the legislative action of the City Council in denying the rezoning request. However, the Michigan Supreme Court erroneously

[14] Contrary to this unanimous sentiment by the members of the Ohio Supreme Court, the Michigan Supreme Court erroneously opined that "Paragon's rezoning request is not a final decision because, absent a request for a variance, there is no information regarding the potential uses of the property that might have been permitted[.]" [See App. A at A-11].

expanded the *Williamson County* ripeness doctrine beyond its intended scope, to the extent that it has now deprived all Michigan landowners of valuable constitutionally protected property rights, both to seek invalidation of an unconstitutional zoning ordinance and to seek Taking damages.

This Court has already recognized the significant need to resolve the uncertainty and inconsistent application of *Williamson County* when it granted the Writ of Certiorari to the Ninth Circuit Court of Appeals in *Suitum*. The decision below also profoundly and adversely affects Paragon's rights under the Fifth and Fourteenth Amendments to the United States Constitution, and is in direct conflict with the United States Court of Appeals for the Sixth and Eleventh Circuits and the Ohio Supreme Court. The instant case and *Suitum*, taken together, along with other post-*Williamson County* developments referred to above, demonstrate the serious and pervasive nature of the issues raised and the pressing need for this Court to clarify the law. Paragon respectfully prays that this Court grant the Petition For Writ Of Certiorari to decide these important federal issues and to resolve such conflicts. In the alternative, Paragon prays

that this Court summarily reverse the decision of the Michigan Supreme Court.

Respectfully submitted,

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Dated: December 30, 1996

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

OPINION

STATE OF MICHIGAN
SUPREME COURT

FILED JULY 23, 1996

PARAGON PROPERTIES COMPANY,

Plaintiff-Appellant,

No. 100064

v

CITY OF NOVI, a Michigan municipal corporation,

Defendant-Appellant.

BEFORE THE ENTIRE COURT
WEAVER, J.

Plaintiff, Paragon Properties Company claims that the Novi zoning ordinance as applied to Paragon's property effected an unconstitutional taking. This claim requires examination of whether the Novi City Council's denial of Paragon's request to rezone its property was a final decision appealable to the circuit court. We find it was not, and that Paragon's constitutional claim is not ripe for review. The Court of Appeals is affirmed.

I

Paragon Properties purchased a seventy-five acre parcel in 1980 for $150,000. The property was vacant, unimproved, and not served by city water or sewer. The property was zoned for large-lot, single-family residential use.

Paragon's property is located in the northwest corner of the City of Novi at the intersection of Napier and Twelve Mile Roads. Across Napier Road and to the west of Paragon's parcel in Lyon Township is an active gravel pit operation. The property to the north across Twelve Mile Road, located in the City of Wixom, is zoned for industrial use. The property to the east and south of Paragon's parcel is located in the City of Novi. The property immediately to the east of Paragon's is undeveloped, but zoned for residential use, and the property to the south is zoned and developed for mobile home use.

In May 1984, Paragon submitted a request to the Planning Board of the City of Novi to rezone the property from a single-family residential zone to a mobile home district zone. The planning board held a public hearing in August 1984 and recommended that the rezoning request be denied. At a subsequent public hearing, Novi's City Council denied Paragon's request.

Paragon filed its initial complaint in Oakland Circuit Court in 1985. That case was dismissed without prejudice in February 1989. In June 1989, Paragon again filed a complaint in Oakland Circuit Court alleging that the property had no economic potential for development as zoned because of adjacent industrial uses and poor drainage conditions; the highest and best use of the property

would be for mobile home development; as applied to the property, the zoning ordinance was unreasonable, confiscatory, discriminatory; and the ordinance unconstitutionally deprived Paragon of its property in violation of the Due Process Clauses of the Michigan and federal constitutions.

Novi moved for summary disposition, arguing that the case should be dismissed because Paragon had failed to seek a use variance from the Novi Zoning Board of Appeals and, therefore, had not obtained a final decision regarding the potential uses of the property. The circuit court denied Novi's motion, holding that the finality argument had not been timely raised[1] and that, because this was a zoning case and not a variance case, Paragon had exhausted its administrative remedies.

The case proceeded to trial in July 1990. The circuit court held that the zoning ordinance as applied to Paragon's property effected an unconstitutional taking and entered a judgment against Novi for $198,930 plus attorney fees. Novi moved unsuccessfully for a judgment notwithstanding the verdict and a new trial. Novi then filed its appeal with the Court of Appeals. The Court of Appeals reversed the circuit court on the grounds that Paragon's constitutional claim was not ripe for review because Paragon had not sought a variance from the zoning board of appeals and had not brought a state

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[1] The circuit court later permitted Novi to amend its pleading to include the ripeness issue, finding that the amendment would not prejudice Paragon. Order entered June 20, 1990.

inverse condemnation action. 206 Mich App 74; 520 NW2d 344 (1994).

II

The zoning of land is a reasonable exercise of government police power. *Village of Euclid, Ohio v Ambler Realty Co*, 272 US 365; 47 S Ct 114; 71 L Ed 303 (1926). *Euclid* upheld the enforcement of a zoning ordinance, reasoning that modern pressures on land use have created sufficient public interest in the segregation of incompatible land uses to justify a diminution in property values. *Id.* at 386-390. The Michigan zoning enabling act, MCL 125.581 *et seq.*; MSA 5.2931 *et seq.*, establishes procedures for the enactment, amendment, and administration of zoning ordinances.

Because zones established by ordinance will not always reflect the realities of all land controlled by a zoning ordinance, the enabling act provides for administrative relief from the application of an ordinance. The discretionary authority to enact a zoning ordinance and to adopt a zoning map rests with the legislative body of a city or village. MCL 125.584(4); MSA 5.2934(4).

The legislative body or a city of village may also have the discretionary authority to temper the effect of a zoning ordinance through special land use permits, MCL 125.584a; MSA 5.2934(1), or planned unit development, MCL 125.584b; MSA 5.2934(2). Further, the zoning board of appeals may grant administrative relief from the strict application of the ordinance in the form of land use variances. MCL 125.585(9); MSA 5.2935(9).

Pursuant to the enabling act, Novi's zoning ordinance reserves the power to rezone land within Novi to the Novi City Council.[2] Also pursuant to the enabling act, Novi's zoning ordinance authorizes the Novi Zoning Board of Appeals to grant a land use variance where "it is clearly shown that the land cannot be used for a zoned use. . . . " Novi Zoning Ordinance, § 3104(1). A land use variance essentially is a license to use property in a way not permitted under an ordinance.[3] The zoning board of appeals has the authority to allow a use in a zoning district that would not otherwise be allowed.[4] See, e.g.,

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[2] MCL 125.581(1); MSA 5.2931(1) states:

> The legislative body of a city or village may regulate and restrict the use of land and structures; to meet the needs of the state's residents for food, fiber, energy and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land; to insure that uses of the land shall be situated in appropriate locations and relationships; to limit the inappropriate overcrowding of land and congestion of population and transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility needs; and to promote public health, safety, and welfare . . .

[3] 2 Cameron, Michigan Real Property (2d ed), § 23.12, p 1069. See also *Nat'l Boatland, Inc v Farmington Hills Zoning Bd of Appeals*, 146 Mich App 380, 387; 380 NW2d 472 (1985) (defining a use variance as permitting a use of land that the zoning ordinance would otherwise proscribe.

[4] Cases in which variances for uses other those that permitted in zoning district include: *O'Keefe v ZBA of City of East Grand Rapids*, 35 Mich App 583; 192 NW2d 509 (1971) (a medical office building variance was granted in residential zone); *Beatrice Block Club Association v Facen*, 40 Mich App 372; 198 NW2d 828 (1972) (an electrical contractor's shop and building

Novi Zoning Ordinance, § 3104(1). However, variances should be sparingly granted so that the grant of one variance in an area where many parcels are similarly situated does not result in a material change to the zoning district. *Puritan-Greenfield Ass'n v Leo*, 7 Mich App 659, 671; 153 NW2d 162 (1967). Although, the grant of a land use variance cannot change the zoning district classification or amend the zoning ordinance, the effect of a land use variance is similar to rezoning because variances typically run with the land. 2 Cameron, Michigan Real Property (2d ed), § 23.12, p 1070.

Zoning ordinances, combined with mechanisms like land use variances, enable local governments to more adeptly manage land within their jurisdictions.[5] Land use variances, when properly utilized, function interdependently with other zoning ordinance provisions to ensure that the "spirit of the ordinance shall be observed, public safety secured, and substantial justice done." MCL 125.585(9); MSA 5.2935(9).

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was allowed in residential zone); *Reilly v Township of Marion*, 113 Mich App 584; 317 NW2d 693 (1982) (a trucking business was allowed in an agricultural/residential zone through a special use exception granted by the zoning board of appeals).

[5] The enabling act also provides for possible relief from the application of an ordinance by appeal to the circuit court from a variety of decisions under a zoning ordinance. The enabling act specifically anticipates appeals to the circuit court from decisions of the legislative body of a city regarding nonconforming uses under MCL 125.583a; MSA 5.2933(1), and for appeals from decisions of the zoning board of appeals under MCL 125.585(11); MSA 5.2935(11).

III

Although the police power allows the government to regulate land use, the Fifth Amendment requires that compensation be paid if a government regulation unreasonably shifts social costs to an individual or individuals. *Village of Euclid, supra* at 387. A claim for compensation may allege that an ordinance is confiscatory "as applied" or "on its face." A facial challenge alleges that the mere existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of all property regulated in the market. *Id.* at 395. An "as applied" challenge alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution. *Id.*

A challenge to the validity of a zoning ordinance "as applied," whether analyzed under 42 USC 1983 as a denial of equal protection, as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment, is subject to the rule of finality. *Lake Angelo Associates v White Lake Twp*, 198 Mich App 65, 70; 498 NW2d 1 (1993), citing *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172, 186; 105 S Ct 3108; 87 L Ed 2d 126 (1985).[6]

> [T]he finality requirement is concerned with whether the initial decision maker has arrived at

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[6] Additional cases relying on *Williamson's* finality requirements include: *MacDonald, Sommer & Frates v Yolo Co*, 477 US 340; 106 S Ct 2561; 91 L Ed 2d 285 (1986); *Kinzli v Santa Cruz*, 818 F2d 1449 (CA 9, 1987); *Unity Ventures v Lake Co*, 841 F2d 770 (CA 7, 1988).

> a definitive position on the issue that inflicts an actual, concrete injury. . . . [7]

Finality is not required for facial challenges because such challenges attack the very existence or enactment of an ordinance. *Beacon Hill Farm Assoc v Loudoun Co Bd of Supervisors*, 875 F2d 1081 (CA 4, 1989).

Williamson articulated the need for finality in the context of land use regulation. In *Williamson*, a property owner obtained preliminary approval of a residential subdivision plat from the planning commission. The planning commission later amended its ordinance, reducing the allowable density permitted on the land, and, therefore, disapproved the property owner's subsequent plats. The property owner sued in federal district court, alleging that the ordinance effected an unconstitutional taking as applied to his property.[8] However, because the property owner in *Williamson* failed to seek alternative relief, in the form of variances, available under the zoning ordinance, the Court concluded that the property owner's claim was not ripe for review.[9]

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[7] *Williamson, supra* at 193.

[8] *Williamson, supra* 186.

[9] *Williamson, supra* at 193-194 stated:

> The Commission's refusal to approve the preliminary plat does not determine that issue; it prevents respondent from developing its subdivision without obtaining the necessary variances, but leaves open the possibility that respondent may develop the subdivision according to its plat after obtaining variances. In short, the Commission's denial of approval does not conclusively determine whether respondent will be denied all reasonable beneficial

Williamson further requires that a landowner challenging the constitutionality of a zoning ordinance as applied to pursue a state inverse condemnation claim before the claim will mature. *Williamson, supra* at 192-197.[10] This Court expressly adopted the *Williamson* finality requirements in *Electro-Tech, Inc v HF Campbell Co,* 433 Mich 57, 81-91; 445 NW2d 61 (1989).

In *Electro-Tech,* a landowner claimed that the City of Westland had taken his property without just compensation or due process of law when it imposed several conditions on his development. The landowner later failed to submit a final site plan for approval. The Court held: "[U]ntil . . . the council's objections . . . are addressed and finally resolved . . . it is impossible to accurately determine the extent to which the plaintiff's land retained any reasonable beneficial use or the extent to which the plaintiff's expectation interest had been destroyed." *Id.* at 85.

The finality requirement aids in the determination whether a taking has occurred by addressing the actual economic effect of a regulation on the property owner's investment-backed expectations.[11] As noted in *Williamson,* factors affecting a property owner's investment-backed expectations "simply cannot be evaluated until the administrative agency has arrived at a final, definitive

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use of its property, and therefore is not a final, reviewable decision.

[10] We need not address the issue whether Paragon has pursued an inverse condemnation claim because we find that Paragon failed to obtain a final decision regarding the full effect of Novi's zoning ordinance on the use of Paragon's land.

[11] *Williamson supra* 193.

position regarding how it will apply the regulations at issue to the particular land in question."[12] Investment-backed expectations are distinguishable from mere financial speculation.[13]

Paragon claims that the Novi City Council's decision to deny Paragon's rezoning request was a final decision as contemplated by *Electro-Tech* because the city council is the initial decisionmaker regarding rezoning requests. For further support, Paragon attempts to distinguish the city council's "unconditional" denial of rezoning from the "conditional"approval of the site plan in *Electro-Tech*, which this Court held was not a final decision. However

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[12] *Id.* at 191. See also *Herrington v Sonoma Co*, 834 F2d 1488, 1494 (CA 9, 1987), which stated:

> In land use challenges, the doctrine of ripeness is intended to avoid premature adjudication or review of administrative action. It rests upon the idea that courts should not decide the impact of regulation until the full extent of the regulation has been finally fixed and the harm caused by it is measurable.

[13] The Taking Clause does not guarantee property owners an economic profit from the use of their land. *See, e.g., Sun Oil Co v Madison Heights*, 41 Mich App 47, 56; 199 NW2d 525 (1972). Indeed, courts are not especially competent to engage in profit prediction for land speculators, thus "[t]he interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." *Andrus v Allard*, 444 US 51, 66; 100 S Ct 318; 62 L Ed 2d 210 (1979). Furthermore, the mere diminution of property value by application of regulations without more does not amount to an unconstitutional taking. *Penn Central Transportation Co v City of New York*, 438 US 104; 98 S Ct 2646; 57 L 2d Ed 631 (1978). *See also Lamb v City of Monroe*, 358 Mich 136, 144; 99 NW2d 566 (1959).

Paragon's attempt to distinguish *Electro-Tech* oversimplifies the legal finality issue and ignores a requisite inquiry into finality: whether the decision, conditional or unconditional, inflicted "an actual, concrete injury." *Williamson, supra* at 193.

The City of Novi's denial of Paragon's rezoning request is not a final decision because, absent a request for a variance, there is no information regarding the potential uses of the property that might have been permitted, nor, therefore, is there information regarding the extent of the injury Paragon may have suffered as a result of the ordinance.[14] While, the city council's denial of rezoning is certainly a decision, it is not a final decision under *Electro-Tech* because had Paragon petitioned for a land use variance, Paragon might have been eligible for alternative relief from the provisions of the ordinance.[15]

While Paragon correctly characterizes Novi's rezoning denial as a legislative act rather than an administrative decision, this distinction does not resolve the finality issue. Requiring Paragon to seek a variance from the zoning board of appeals after the city council's rezoning

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[14] This is not a case in which all development of the land was physcially impossible by application of the ordinance. *See, e.g., Robyns v City of Dearborn*, 341 Mich 495; 67 NW2d 718 (1954). Nor is this a case involving exclusionary zoning. *See, e.g., English v Augusta Twp*, 204 Mich App 33; 514 NW2d 172 (1994), and MCL 125.592; MSA 5.2942.

[15] Moreover, neither a city council's decision to rezone land nor a Zoning Board of Appeals decision to grant a variance is relevant to the constitutionality or unconstitutionality of an ordinance's provisions. However, such decisions do enlighten a court's review when a question of constitutional proportion is properly raised.

denial does not result in an invasion of the legislative authority of the city council to enact and amend zoning ordinances. That the zoning board of appeals does not have the statutory authority to amend a zoning ordinance does not render it incapable of offering an alternative form of relief to Paragon.[16]

The Legislature specifically intended that the zoning board of appeals have the administrative authority to permit uses that would otherwise not be permitted under a zoning ordinance.

> If there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the ordinance, the board of appeals may in passing upon appeals vary or modify any of its rules or provisions relating to . . . the use of land . . . so that the spirit of the ordinance shall be observed, public safety secured, and substantial justice done.[17]

The decision of the city council on the rezoning request in no way diminished the zoning board of appeal's authority to grant a variance if Paragon pursued that alternative

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[16] The United States Court of Appeals for the Sixth Circuit rejected a similar argument in *Sequin v Sterling Heights*, 968 F2d 584, 588 (CA 6, 1992). When landowners challenged the finality requirement claiming that the zoning board of appeals was "impotent" to grant a variance because that would amount to amending the zoning ordinance. The court responded:

> Their argument that the Board of Zoning Appeals is "impotent" to grant variances runs directly counter to . . . the Sterling Heights Zoning Ordinance, which specifically povides that the Board can grant a variance under certain circumstances.

[17] MCL 125.585(9); MSA 5.2935(9).

form of relief. Were the zoning board of appeals to deny Paragon's request, relief in the form of an appeal to the circuit court is authorized by statute. MCL 125.585(11); MSA 5.2935(11).

Finally, Paragon asserts that it would have been futile to seek a use variance from Novi's Zoning Board of Appeals because the issues associated with its property affect other properties in the neighborhood.[18] The zoning enabling act allows for variances only when the ordinances as applied creates "practical difficulties or unnecessary hardship." MCL 125.585(9); MSA 5.2935(9). Paragon relies on *Puritan-Greenfield Ass'n v Leo*, 7 Mich App 659, 671; 153 NW2d 162 (1967), which construed the hardship requirement of MCL 125.585(9); MSA 2.1935(9) in conjunction with the general principle that variances should be sparingly granted, and concluded that the hardship must be "unique or peculiar to the property for which the variance is sought."

The principle that variances should be sparingly granted is based on the possibility that granting the variance to a single landowner suffering a plight common to neighboring property could undermine the broad goals of a zoning ordinance by precipitating a series of variance requests. However, the statute does not require that

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[18] Paragon claimed that its property and the surrounding properties suffered poor drainage, making the development of large-lot, single-family residences financially infeasible. While there is some evidence in the record to support the contention that there are drainage issues at the site and surrounding sites, there is no information regarding how the land might be developed in light of the alleged limitations.

"only a single ownership parcel of land be affected by the unique circumstances in the neighborhood in order to qualify for relief . . . " *Beatrice Block Club Ass'n v Facen*, 40 Mich App 372, 381; 198 NW2d 828 (1972). The zones created by ordinance cannot be expected to conform exactly to the physical boundaries of "problems" associated with land. It would be inappropriate and an under limitation of the available statutory relief to strictly apply *Puritan-Greenfield's* uniqueness concept in this case.[19] Thus, we reject Paragon's futility argument.

CONCLUSION

Because Paragon failed to obtain a final decision from which an actual or concrete injury can be determined, its constitutional claim is not ripe for review. The judgment of the Court of Appeals is affirmed.

BEFORE THE ENTIRE BENCH

CAVANAGH, J. (dissenting).

Repeat after me: "This is a rezoning case. This case does *not* involve a request for a use variance. The city council alone has the power to rezone. The zoning board of appeals has *no* authority to rezone property." If these

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[19] This opinion is not intended to decide the appropriateness of a land use variance in this case, nor to modify in any way the standards to be applied by zoning boards of appeal in their variance request decisions.

basic principles are kept in mind, the "ripeness" argument is seen as the pointless waste of time and resources that it is.

The majority holds that "[b]ecause Paragon failed to obtain a final decision from which an actual or concrete injury can be determined, its constitutional claim is not ripe for review." Slip op, p 15. Under longstanding precedent of this Court, the Novi City Council's denial of plaintiff's rezoning request was a final decision on the actual issue presented by plaintiff's complaint in this case, i.e., the constitutionality of the challenged zoning ordinance. Furthermore, the Novi Zoning Board of Appeals is precluded by the zoning enabling act, MCL 125.581 *et seq.*; MSA 5.2931 *et seq.*, and the Novi Zoning Ordinance from granting the relief sought. Accordingly, I dissent from the majority's conclusion that the merits of plaintiff's constitutional challenge to the Novi Zoning Ordinance are not ripe for appellate review.

I

The statement of facts in the majority opinion contains what I perceive as the essential fact in resolving the case before us.

> In May 1984, Paragon submitted a request to the Planning Board of the City of Novi to rezone the property from a single-family residential zone to a mobile home district zone. The planning board held a public hearing in August 1984 and recommended that the rezoning request be denied. At a subsequent public hearing, Novi's City Council denied Paragon's request. [Slip op, p 2.]

Plaintiff's request for rezoning is the accurate characterization of the substance of that request, a characterization that is the necessary prerequisite to a proper application of the relevant law. What plaintiff wants is its property rezoned from large lot, single family to mobile home, a totally distinct zoning classification and a difference that exceeds the applicability of a use variance. At the hearing on defendant's request for summary judgment, plaintiff's counsel specifically advised the trial court that plaintiff was not asking for a variance from the present zoning classification; rather, plaintiff sought to have the property rezoned to another, distinct zoning classification.

II

In *Long v Highland Park*, 329 Mich 146; 45 NW2d 10 (1950), the plaintiffs filed a complaint in circuit court, seeking a declaratory judgment that a zoning ordinance was unconstitutional. The defendant, on appeal in this Court, claimed that the courts were without jurisdiction because "the plaintiffs had not exhausted their remedy under the provisions of the zoning ordinance by applying for a building permit, seeking relief from the zoning board of appeals, the zoning commission, and the common council of the city."[1] *Id.* at 149. This Court held that

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[1] There is no indication in the *Long* opinion that the plaintiffs made a rezoning request to the Highland Park City Council. Because such a rezoning request was made in this case, there is no need to consider whether *Long* and other decisions of this Court should be overruled to require that there always be a request for rezoning.

"[t]here is no merit in the claim." *Id.* The Court's conclusion was based, in relevant part, on the fact that the relevant municipal authorities "could not grant the relief here sought." *Id.* This exact situation obtains in the case at bar. Paragon's complaint alleged that "the zoning ordinance of the City of Novi as applied to Plaintiff's Property is unconstitutional and is void," that "the actions of the City of Novi in refusing to rezone Plaintiff's Property to permit the use as a mobile home park are unreasonable, oppressive and a discriminatory exercise of the City's police power insofar as it affects Plaintiff and Plaintiff's Property," and requested that the circuit court "enter judgment finding that the zoning ordinance of the City of Novi as applied to Plaintiff's Property described in this Complaint is an unconstitutional abuse of the police power and is null and void."

Plaintiff wants its property rezoned; it wants to use its property in accordance with a zoning classification (mobile home) that is wholly distinct from the zoning classification (large lot, single family) being challenged in this case. Rezoning is beyond the power of a zoning board of appeals, and the "use" to which plaintiff wants to put its land is plainly beyond the permissible scope of any use variance the Novi Zoning Board of Appeals could grant.

III

A

The Charter of the City of Novi enumerates those subjects that "the City shall have power with respect to" and those that the City "may, by ordinance or other

lawful acts of its officers, provide for. . . . " Novi City Charter, § 2.2. Relevant to this case is subsection 1, which confers on the city the power of

> [e]stablishing districts or zones within which use of land and structures, the height, the area, the size and location of buildings and required open spaces for light and ventilation of such buildings and the density of population may be regulated by ordinances in accordance with statutory provisions governing zoning; and to prescribe by ordinance, method of enforcement of conditions imposed by the Board of Appeals on applications for variances or for certificates or licenses under provisions of a zoning ordinance. . . . [*Id.*, § 2.2(1).]

The legislative function of establishing land use zones by ordinance can be exercised only by the city through its legislative body, the city council.[2] And also within this legislative compass is the power to circumscribe the conditions under which a zoning board of appeals may grant use variances. Under the ordinances governing this case, the Novi Zoning Board of Appeals is unable to grant the relief plaintiff seeks.

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[2] Any such major change in the use of property, as requested here (i.e., single family residential to mobile home park), would also be subject to § 7.8 of the Novi City Charter, which allows objecting citizens to call for a referendum on such a legislative determination. If, as the majority thinks possible, the Zoning Board of Appeals, without amendment of the current zoning ordinance, grants plaintiff the relief it seeks and allows its "use" to be changed to mobile homes, there would be no ordinance regarding which objecting citizens could exercise their charter-based right of referendum.

B

The authority under which municipalities enact zoning ordinances is the state zoning enabling act. The provision of that act relevant to the issue before us states:

> If there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the ordinance, the board of appeals may in passing upon appeals vary or modify any of its rules or provisions relating to the construction, or structural changes in, equipment, or alteration of buildings or structures, or the use of land, buildings, or structures, so that the spirit of the ordinance shall be observed, public safety secured, and substantial justice done. [MCL 125.585(9); MSA 5.2935(9).]

Pursuant to this authority, the Novi City Council enacted § 3104 of its municipal code, which, as the majority duly notes (slip op, p 5), provides that the Novi Zoning Board of Appeals may grant a land use variance where "it is clearly shown that the land cannot be used for a zoned use. . . . " A more complete quotation of § 3104, however, demonstrates the legal basis for my dissent.

> The Zoning Board of Appeals shall not have the power to alter or change the zoning district classification of any property, nor to make any change in the terms of this Ordinance but shall have the power to authorize a use in a zoning district in which it is not otherwise permitted, provided it is clearly shown that the land cannot be used for a zoned use. . . . [Novi Zoning Ordinance, § 3104(1).]

Plaintiff does not argue that the land cannot be used for large-lot, single family development. Rather, plaintiff's

claim is that such development is not economically feasible. It, therefore, might even be questionable whether plaintiff would satisfy the threshold requirements for the Novi Zoning Board of Appeals to consider the possibility of granting a use variance.

Subsection 1(b) of § 3104 further specifies the permissible bases for the Novi Zoning Board of Appeals to grant a land use variance:

> To authorize, upon an appeal, a variance from the strict application of the provisions of this Ordinance where by reason of exceptional narrowness, shallowness, shape or area of a specific piece of property at the time of enactment of this Ordinance or by reason of exceptional topographic conditions or other extraordinary or exceptional conditions of such property, the strict application of the regulations enacted would result in peculiar or exceptional practical difficulties to or exceptional undue hardship upon the owner of such property provided such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of this Ordinance.

In my opinion, no plausible interpretation of these carefully defined and exacting standards could allow the Novi Zoning Board of Appeals to grant plaintiff's rezoning request in the guise of a use variance.

C

Disastrous results will flow from the majority's requirement that every rezoning request must be run

through a zoning board of appeals. These boards are comprised of citizen appointees with no required expertise in land use or planning. They review each request for a variance *as presented*. They have no staff of expert or professional planners. They do *not*, nor are they required to, explore the variety of potential variances to which a petitioner might be able to establish an entitlement. Again, remember that this petitioner *does not want* a variance. When presented with this petitioner's request for rezoning to mobile home classification, this board *could do nothing* other than say, "Get out of here. Go see the city council!"

Another flaw in the majority's view of this case is the mistaken assumption that running every rezoning request through a zoning board of appeals will produce some definitive relief or establish some kind of binding determination. The majority states, "The City of Novi's denial of Paragon's rezoning request is not a final decision because, absent a request for a variance, there is no *information regarding the potential uses of the property* that might have been permitted, nor, therefore, is there *information regarding the extent of the injury* Paragon may have suffered as a result of the ordinance." (Emphasis added.) Slip op, pp 11-12. As stated previously, this mistakenly assumes a zoning board of appeals considers, determines, or offers other potential uses. It does *not*, even when the petitioner is specifically seeking a particular variance, let alone as here where the petitioner does not want a variance but is seeking to rezone. Further, the information "regarding the extent of the injury Paragon may have suffered as a result of the ordinance" is the petitioner's burden to produce, as was done here, to the planning

commission and the city council, and then to the circuit court. Assuming this petitioner jumped through the unnecessary, unavailing hoop the majority requires, would any "finding" by the zoning board of appeals be binding on a reviewing court? I hardly think so. The city would still have to present its expert testimony, as it did here, to satisfy the court that there were alternatives *within that zoning classification* to which the plaintiff could put its property.

D

Finally, I would be remiss if I failed to point out the majority's complete misunderstanding of the two cases on which it primarily relies, *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172; 105 S Ct 3108; 87 L Ed 2d 126 (1985), and *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57; 445 NW2d 61 (1989). Both cases are inapposite to the situation here presented. In *neither* case was a *rezoning* sought or at issue.

In *Williamson, supra*, the developer's proposed plat did not comply with certain requirements of the current zoning ordinance. The Court stated at 188:

> It appears that variances could have been granted to resolve at least five of the Commission's eight objections to the plat. The Board of Zoning Appeals had the power to grant certain variances from the zoning ordinance, including the ordinance's density requirements and its restriction on placing units on land with slopes having a grade in excess of 25%. Tr. 1204-1205; see n 3, *supra*. The Commission had the power

> to grant variances from the subdivision regulations, including the cul-de-sac, road-grade, and frontage requirements. Indeed, the Temple Hills Committee had recommended that the Commission grant variances from those regulations. App 304-306. Nevertheless, respondent did not seek variances from either the Board or the Commission.

Unlike here, the *Williamson* developer was not asking that the zoning classification be changed, and the zoning board of appeals had the authority to vary some of the current zoning classification's requirements.

The majority's other cornerstone, *Electro-Tech*, is also inapposite to this case. I signed Justice Brickley's dissent in *Electro-Tech* because I agreed with him that the majority seriously misread *Williamson*. But, putting aside that dispute, any reading of *Electro-Tech* would quickly disclose that it also did *not* involve a change in zoning classification. There was no question in that case that the petitioner's property was in the appropriate zoning classification for the use sought, i.e., another manufacturing plant behind the existing facility. Chief Justice Riley wrote for the majority:

> In the instant case, the council had imposed, in addition to the improper dedication requirement, four "valid" conditions on the issuance of the permit. Because Electro-Tech failed to remedy these valid requirements or to submit a revised site plan evidencing compliance therewith, it was unclear whether or how much the improper condition interfered with the owner's investment-backed expectations. Electro-Tech's claim, therefore, was not ripe for review. See discussion of *Williamson Co Regional Planning*

> *Comm v Hamilton Bank of Johnson City*, 473 US 172; 105 S Ct 3108; 87 L Ed 2d 126 (1985), in section II(C).
>
> Because we conclude in section II(C), that the City of Westland had not made a final determination regarding the disposition of Electro-Tech's property, we need not decide at this time whether Electro-Tech has established an unconstitutional taking. [433 Mich 75.]

Those conditions, prerequisites to issuance of building permits, clearly *could have been* altered, varied, or changed by the city council or the zoning board of appeals. Thus, the plaintiff having failed to request that relief, the *Electro-Tech* majority concluded that there had been no "final" determination by the city. The distinction between this case and both *Williamson* and *Electro-Tech* could not be clearer. This plaintiff does not seek or wish any of the other (who knows how many) possible uses available to it in its current zoning classification. It sought a rezoning of its property so it could erect a mobile home park. This plaintiff received a "final" determination from the City of Novi when the city council, the only body able to grant the relief sought, denied the rezoning request. Plaintiff, then, bearing the very heavy burden of proving the city's action arbitrary, capricious, unreasonable, and confiscatory because it was deprived of all reasonable use of its property, could clearly seek redress in circuit court.

E

In my opinion, the requirements in the zoning enabling act ("that the spirit of the ordinance shall be

observed") and in the Novi Zoning Ordinance (that a use variance may be authorized only "without substantially impairing the intent and purpose of this Ordinance") would not be satisfied by a use variance that gave plaintiff the relief it seeks. Therefore, because the Novi City Council's denial of plaintiff's request to rezone its property constituted the final legal decision available with regard to the actual substance of plaintiff's request, plaintiff should not be required to seek a use variance in this case.

IV

I would reverse the decision of the Court of Appeals that a final decision was not obtained and remand this case to the Court of Appeals for review of the merits of the circuit court's opinion and judgment.[3] I would also instruct the Court of Appeals to address the effect, if any, of the Novi City Council's subsequent rezoning of the property at issue to light industrial.

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[3] At this point, I note my agreement with the majority that "[t]his is not a case in which all development of the land was physically impossible by application of the ordinance" (slip op, p 12, n 17) because I think this factor is integral to ultimate resolution of this case.

APPENDIX B

OPINION

STATE OF MICHIGAN
COURT OF APPEALS

PARAGON PROPERTIES COMPANY,

Plaintiff/Appellee/
Cross-Appellant,

v

CITY OF NOVI,

Defendant-Appellant/
Cross-Appellee.

April 7, 1994

No. 136645
LC No. 89-370926-AZ

BEFORE: TAYLOR, P.J., HOOD AND B.A. JASPER, JJ.

PER CURIAM

In 1980, plaintiff Paragon Properties bought property located in the City of Novi that was zoned for single family residential use. In 1984, Paragon requested that defendant City of Novi rezone it for a mobile home park, but Novi declined to rezone the property. After a first lawsuit was dismissed upon the parties' stipulation, Paragon recommenced its suit against Novi in June 1989. Paragon's claim was that Novi had effected an unconstitutional taking of Paragon's property. Novi moved for partial summary disposition on the ground that Paragon's claim was not ripe for adjudication because no final decision had been made, i.e., it was impossible to say there had been a taking because Paragon had neither

sought a variance from the zoning board of appeals nor exhausted its state remedies by making an inverse condemnation claim. Paragon, in turn, argued that Novi's denial of its rezoning application constituted a final decision from which it was entitled to seek damages, and asserted that Novi was barred from asserting ripeness because it had failed to raise it as an affirmative defense in its first responsive pleading as required by MCR 2.111(F)(3). After hearing the motion, the trial court agreed with Paragon and denied Novi partial summary disposition.

Novi's application to this Court for leave to appeal the trial court's ruling was denied, and after Novi was allowed to file its affirmative defenses, a bench trial was held in July 1990. The thrust of Paragon's case was that it was economically infeasible to develop the property for single family residences under the existing zoning classification because the property lacks a sewer system and the soil does not percolate sufficiently to allow individual septic systems; the cost of installing a packaged water treatment system could be borne if it was amortized over a great number of units, i.e., over a mobile home park with 240 to 400 units, a cost that would be overwhelming if it was borne by a subdivision with 11 to 26 single family residences. The trial court found that Paragon had been deprived of all reasonable use of the property, and therefore the zoning classification was an unconstitutional confiscation of Paragon's property.

Accordingly, a judgment entered enjoining Novi from enforcing the single-family residential zoning classification and awarding Paragon damages of $12,000 per acre plus interest from 1984, as well [sic] attorney and witness

fees. After Novi unsuccessfully moved for a new trial or judgment notwithstanding the verdict, it appealed to this Court from the judgment. Paragon cross-appeals concerning the amount of damages. We reverse.

The dispositive issue is whether Novi's denial of Paragon's rezoning application constituted a final determination from which Paragon could seek redress in the circuit court. Of course, Paragon contends that Novi's denial was a final determination: Novi argues that Paragon was obliged to seek a zoning variance from the zoning board of appeals and to bring a state inverse condemnation action before its constitutional claim was ripe. We agree with Novi.

Under Michigan law, the doctrine of finality requires a property owner to obtain a final decision form [sic] the governmental entity alleged to have unconstitutionally taken the property and also attempt to obtain just compensation through inverse condemnation. The purpose of the finality requirement is to ensure that there actually was a taking. *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 61; 445 NW2d 61 (1989), cert den 493 US 1021 (1990); *Lake Angelo Associates v White Lake Twp*, 198 Mich App 65; 498 NW2d 1 (1993).

We also reject Paragon's contention that Novi waived the defense of finality because it failed to raise it as an affirmative defense in its first responsive pleading. Finality goes to subject matter jurisdiction and thus need not be listed as an affirmative defense. *Pearson v Grand Blanc*, 961 F2d 1211, 1214-1215 (CA 6, 1992); *Campbell v St John Hosp*, 434 Mich 608, 616; 455 NW2d 695 (1990); *Grand*

Blanc Landfill, Inc. v Swanson Environmental, Inc. 200 Mich App 642, 646; 505 NW2d 46 (1993), lv pdg.

Finally, Paragon attempts to overcome the finality requirement by arguing that it would have been futile, as well as a measure taken in bad faith, to have sought a variance from the Zoning Board of Appeals. We disagree in light of the exceptional hardship exception that affords the zoning board of appeals the opportunity to grant the variance regardless of Paragon's ability to otherwise qualify.

Because we reverse the judgment on finality grounds, we do not reach or consider the other issues raised in this case by Novi in its direct appeal or Paragon on its cross-appeal.

Reversed.

/s/ Clifford W. Taylor
/s/ Harold Hood
/s/ Beverley Anne Jasper

APPENDIX C

STATE OF MICHIGAN
IN THE SUPREME COURT

ORDER

Entered: October 7, 1996

Rehearing No. 367

PARAGON PROPERTIES COMPANY,

Plaintiff/Appellant,

v

CITY OF NOVI,

Defendant/Appellee.

SC 100064
CoA 1665
LC 89-370926-AZ

In this cause, a motion for rehearing is considered, and it is hereby DENIED.

Boyle, J., states: I join in the denial of the motion for rehearing because the resolution of the ripeness issue addressed in the opinion involves only an "as applied" constitutional challenge.

Levin and Cavanagh, JJ., would grant rehearing.

APPENDIX D

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF OAKLAND

PARAGON PROPERTIES COMPANY,

Plaintiff,

v.

CITY OF NOVI, a Michigan municipal corporation,

Defendant.
_____/

Case No. 89 370928
Hon. JOHN N. O'BRIEN

Case previously filed and assigned to Judge O'Brien, Case No. 85-288614-AZ, case dismissed without prejudice on February 9, 1989

CARSON FISCHER POTTS AND HYMAN
By: NORMAN L. LIPPITT (P16716)
J. LEONARD HYMAN (P15318)

Attorneys for Plaintiff
300 E. Maple, Third Floor
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_____/

COMPLAINT

NOW COMES the above named Plaintiff, PARAGON PROPERTIES COMPANY, by and through its attorneys, CARSON FISCHER POTTS AND HYMAN and NORMAN L. LIPPITT, and for its Complaint against Defendant states as follows:

1. Plaintiff is a Michigan co-partnership with offices in the City of Birmingham, County of Oakland and State of Michigan.

2. Defendant, CITY OF NOVI, is a Michigan municipal corporation located in the County of Oakland and State of Michigan.

3. Plaintiff, PARAGON PROPERTIES COMPANY, is the owner of a certain parcel of real property located in the City of Novi, more fully described upon Exhibit A attached hereto and incorporated herein by reference (hereinafter referred to as the "Property").

4. The Property is located on the westerly boundary of the City of Novi on and at the intersection of Napier Road and Twelve Mile Road.

5. The Property is vacant property, unimproved and unused and has been so for a number of years and for all the time that Plaintiff has owned said Property.

6. The Property is now and has been for some time zoned RA (formerly designated as R1F) and R-2 pursuant to the City of Novi zoning ordinance.

7. The Property is located in the western portion for the City which is not served by municipal sewers or water service and will not be so served in the foreseeable future. The heaviest population of the City is in the southeast portion of the City which is, in fact, served by sewers and water.

8. The Property has no economic potential for development nor does it have any potential for any of the uses which are currently permitted by the existing zoning, either at the present time or in the foreseeable future.

9. That on or about May 21, 1984, Plaintiff, PARAGON PROPERTIES COMPANY, submitted to the City of Novi a request that the zoning ordinance of the City be amended to rezone the Property from the current RA zoning to MH Mobile Home District Zone. The Property is well suited for this zoning and there exists a present economic demand and use for property in this zone in the area in which the Property is located.

10. On August 15, 1984, the Planning Board of the City of Novi held a public hearing regarding the request of Plaintiff to rezone the Property to MH Mobile Home District and recommended to the City Council that the Property not be rezoned.

11. On September 10, 1984, the City Council of the City of Novi notified Plaintiff that the Planning Board for the City of Novi had recommended against the rezoning and that there would be a public hearing on September 17, 1984, at the Novi Public Library to formally pass on the request.

12. After consideration by the City Council of the City of Novi, the rezoning petition was denied by the City of Novi.

13. The Property is unsuited and is not usable for any of the purposes which are currently permitted by the zoning ordinance. The reason for the unsuitability of the Property is in part as follows:

A. The Property is not currently served by any of the necessary municipal utilities or services including but not limited to water, sewage disposal services. Further, there is no plan or evidence now, or in the future, to

provide these necessary municipal services for the Property. In addition, these services are necessary to the development of the Property as it is currently zoned and it is not feasible to develop the Property in the manner which it is currently zoned without the availability or the foreseeable future availability of these services.

B. The Property is near and in close proximity with a very large gravel pit which is currently in operation due west of Napier Road. The operation of this gravel pit produces noise, dust, commercial traffic and is generally disruptive and unsightly. The gravel pit operation is detrimental to and affects the use of the Property as currently zoned and for the foreseeable future will continue to so adversely affect the Property.

C. The Property is near and in close proximity with property which is used for industrial and other nonresidential uses which are harmful and detrimental to the development of the Property as it is currently zoned.

D. Even without the detrimental characteristics as cited above, there is no demand in the particular area or sector of the City of Novi where the Property is located for property which is zoned in the manner in which the Property is zoned. There is an excess of land presently zoned and available for the permitted use and much of the land in question is located in more desirable portions of the City of Novi and is served with municipal services and utilities.

E. There is no current nor is there any foreseeable future demand for the use of the Property in accordance with its current zoning and it is not currently nor will it in the foreseeable future be economically feasible to develop the Property in accordance with its existing zoning due to the lack of demand and the unavailability of public water and sewer.

F. That there is no trend of development in the western portion of the City of Novi and no such development is contemplated within the foreseeable future. That for this reason, it is unlikely that the Property can be used in accordance with existing zoning; and as presently zoned, there is no market for Plaintiff's Property.

14. That the retention of the current zoning of the Property by the City of Novi serves no purpose except the sole purpose of keeping the land vacant, unused and in an undeveloped state.

15. That the exclusion of the use of said Property as a mobile home site bears no reasonable relationship to the public health, safety or general welfare.

16. The Property currently abuts existing property which is zoned for mobile home use which property is operating successfully and demonstrates the existing demand for mobile home sites.

17. That the Property as located could be successfully used and developed for mobile home purposes for which there is currently an immediate economic demand. The Property is suitable for development as a mobile home park in accordance with the provisions of

the ordinances of the City of Novi for the following additional reasons:

A. The economic factors in the development of a mobile home park would and will permit the owners of the Property to furnish the necessary water facilities, sewage disposal facilities and other facilities so that the Property could be immediately used. It is economically impossible to furnish these facilities and to use the Property for the purposes for which it is currently zoned.

B. The highest and best use of the Property described is for a mobile home park.

C. At the present, foreseeable future, the only way the Property can be developed and used taking into account economic reality is for mobile home purposes.

D. There is currently a high demand for mobile home park facilities in the area in which the Property is located. Despite this fact, the City of Novi has zoned the Property for a use for which there already exists in the City of Novi substantial property zoned (and unused or under used). The City has failed to zone sufficient land for mobile home use and there does not exist sufficient mobile home park facilities to meet the current demand for such facilities.

E. That there is no economic demand for property in the area in which the Property is located which is zoned as the Property is currently zoned.

18. As applied to the Property of Plaintiff, the zoning ordinance of the City of Novi is unreasonable, confiscatory, discriminatory, and it is unconstitutional and has deprived Plaintiff of its property in violation of the Due Process Clauses of the Constitutions of the State of Michigan and the United States of America.

19. That the zoning ordinance of the City of Novi as applied to Plaintiff's Property is unconstitutional and is void.

20. That the City of Novi has created a master plan setting forth the City's concept of future development and improvement for it's [sic] municipality. An examination of the plan has shown that the parameters of the plan are such that the inherent limitations of the subject property exclude it from being considered for an inclusion in the plan.

21. That the zoning ordinance of the City of Novi as applied to Plaintiff's Property is unconstitutional and is void.

22. That the actions of the City of Novi in refusing to rezone Plaintiff's Property to permit the use as a mobile home park are unreasonable, oppressive and a discriminatory exercise of the City's police power insofar as it affects Plaintiff and Plaintiff's Property.

23. The zoning ordinance and the Master Plan of the City of Novi as it affects and applies to Plaintiff's Property is not based upon existing conditions, nor is it based upon nor does it advance the public health, safety and general welfare of the people and it denies Plaintiff the reasonable use of its Property.

WHEREFORE, the Plaintiff prays:

A. That the Court enter judgment finding that the zoning ordinance of the City of Novi as applied to the Plaintiff's Property described in this Complaint is an unconstitutional abuse of the police power and is null and void.

B. That upon such finding the Court enjoin the City of Novi, its officers, employees, attorneys and agents from interfering with the Plaintiff's use of the described Property for mobile home purposes in accordance with the requirements of the R-3 zone of the Novi zoning ordinance and the applicable statutes and ordinances or the State of Michigan and the City of Novi relating to mobile home parks.

C. That the Court award the Plaintiff compensation for damages arising as a result of the taking, whether temporary or permanent, in such amount in excess of Ten Thousand ($10,000.00) Dollars as the Court finds equal to the value of the taking, plus such costs and attorneys' fees as are allowable by law.

D. That the Plaintiff have such other and further relief as may be agreeable to equity and good conscience.

APPENDIX E

EXCERPT OF OPINION OF THE TRIAL COURT

(July 17, 1990)

Let me say in conclusion that the Court feels based on all of the testimony and the evidence in this case that the Plaintiff has satisfied its burden that the property will not perk so as to support any of the Defendant's alternate suggestions or proposals, and that the Plaintiff has been deprived all of the use of its property.

That the property has no value as – other than its original purchase price as presently zoned, and that therefore the present zoning is confiscatory, as well as unreasonable.

That the property would indeed have a good deal of value if the rezoning were allowed and the Plaintiff were permitted to proceed with its proposed reasonable use.

The Court declares that the zoning ordinance as it applies to this land is unconstitutional, contrary to its own master plan, to be held to be void and of no force and effect and will enjoin the City of Novi from endorsing the existing zoning designation of the subject property.

The Court will maintain continuing jurisdiction to see that the existing zoning is declared void and that the development is able to proceed, not inconsistent, it should not be misunderstood, not inconsistent with wetlands or woodlands restrictions.

As to the damages, the Court finds, conservatively perhaps, that thirty-five acres are involved in that which

could have been and perhaps will be developed as a mobile home park.

That the thirty-five acres is about what was damaged by the irresponsible zoning that the Court has concluded, and that as to damages, the part of the $150,000, I think was the purchase price of the entire parcel that relates to the thirty-five acres was taken by the Court as the floor original value of the land without rezoning, and based on the testimony of Mr. Anderson that as rezoned those thirty-five acres would have a value of $12,000 per acre; that that was in 1984.

The Court will set the interest rate on that amount at a figure suggested by Defendant at eight percent.

I think that the Defendant's argument comports as a reasonable relationship to an approximate average what Treasury bill rate might have returned over that period of time.

The Court will sign a judgment to this effect.

The issue of attorney fees, the Court is awarding a reasonable attorney fee. They have not be (sic) submitted. They should be submitted first to the Defendant in this case, and he can outline his objections, if any, and particularize them, and then if agreement is not arrived at, then the Court will entertain further hearing in connection with what is a reasonable attorney fee.

APPENDIX F

EXCERPT OF TRIAL COURT HEARING ON DEFENDANT'S MOTION FOR NEW TRIAL

(November 28, 1990)

I don't think the City itself ever felt that the zoning in this case was reasonable.

I do think it was the City's unspoken intention . . . to hold this property in limbo and do what, in my judgment, they then perceived to be an unreasonable zone.

They wanted to hold it in limbo toward the eventuality that it would one day be available to them to be incorporated into a package of an industrial park . . . which as I've said in my judgment, they could not have concluded themselves was reasonable.

APPENDIX G

(SELECTED PROVISIONS OF THE MICHIGAN CITY OR VILLAGE ZONING ACT, MCL 125.581, *et. seq.*)

125.584. Zoning Ordinances; public hearing; notice; report of planning commission; amendment; vote required

Sec. 4 (1) The legislative body of a city or village may provide by ordinance for the manner in which regulations and boundaries of districts or zones shall be determined and enforced or amended, supplemented, or changed. At least 1 public hearing shall be held by the commission appointed to recommend zoning regulations, or, if a commission does not exist, by the legislative body before a regulation becomes effective. . . .

(2) The legislative body of a city or village, unless otherwise provided by charter, may appoint a commission to recommend in the first instance the boundaries of districts and appropriate regulations to be enforced in the districts. If a city or village has a planning commission, that commission shall be appointed to perform the duties set forth in this section. The commission shall make a tentative report and hold at least 1 public hearing before submitting its final report to the legislative body. A summary of the comments submitted at the public hearing shall be transmitted with the report of the commission to the legislative body. The legislative body may hold additional public hearings if it considers it necessary, or as may be required by charter.

(3) In a city or village having a commission appointed to recommend zoning requirements, the legislative body shall not in the first instance determine the boundaries of districts nor impose regulations until after the final report of the commission, nor shall the ordinance or maps be amended after they are adopted in the first instance until the proposed amendment has been submitted to the commission and it has held at least 1 hearing and made report thereon. In either case the legislative body may adopt the ordinance and maps, with our without amendments, after receipt of the commission's report, or refer the ordinance and maps again to the commission for a further report.

(4) After the ordinance and maps have in the first instance been approved by the legislative body of a city or village, amendments or supplements thereto may be made as provided in this section, except that if an individual property or several adjacent properties are proposed for rezoning, notice of the proposed rezoning and hearing shall be given to the owners of the property in question at least 15 days before the hearing.

125.585. Board of appeals; appointment; duties, procedure; appeals; remuneration; finality of decision; judicial review

Sec. 5.(1) The legislative body of a city or village may act as a board of appeals upon questions arising under a zoning ordinance. The legislative body may establish rules to govern

its procedure as a board of appeals. In the alternative, if the legislative body of a city or village desires, the legislative body may appoint a board of appeals consisting of not less than 5 members, each to be appointed for a term of 3 years. Appointments of the first members shall be for terms of 1, 2, and 3 years, respectively, so as nearly as possible to provide for the appointment of an equal number of members each year. After the initial appointments, each member shall hold office for the full 3-year term.

* * *

(3) The board of appeals shall hear and decide appeals from and review any order, requirements, decision, or determination made by an administrative official or body charged with the enforcement of an ordinance adopted under this act. The board of appeals shall also hear and decide matters referred to the board or upon which the board is required to pass under an ordinance of the legislative body adopted under this act. For special land use and planned unit development decisions, an appeal may be taken to the board of appeals only if provided for in the zoning ordinance.

* * *

(9) The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and shall make an order, requirement, decision, or determination as in the board's opinion ought to be made in the premises, and to that end shall have all the powers of the officer or body from whom the appeal is taken. If there are practical difficulties or unnecessary hardship in the way of carrying out the

strict letter of the ordinance, the board of appeals may in passing upon appeals vary or modify any of its rules or provisions relating to the construction, or structural changes in, equipment, or alteration of buildings or structures, or the use of land, buildings, or structures, so that the spirit of the ordinance shall be observed, public safety secured, and substantial justice done.

* * *

(11) The decision of the board of appeals shall be final. However, a person having an interest affected by the zoning ordinance may appeal to the circuit court. Upon appeal, the circuit court shall review the record and decision of the board of appeals to insure the decision meets all of the following:

(a) Complies with the constitution and laws of this state.

(b) Is based upon proper procedure.

(c) Is supported by competent, material, and substantial evidence on the record.

(d) Represents the reasonable exercise of discretion granted by law to the board of appeals.

(12) If the court finds the record of the board of appeals inadequate to make the review required by this section, or that additional evidence exists which is material and with good reason was not presented to the board of appeals, the court shall order further proceedings before the board of appeals on conditions which the court considers proper. The board of appeals may modify its findings and decision as

a result of the new proceedings, or may affirm the original decision. The supplementary record and decision shall be filed with the court.

(13) As a result of the review required by this section, the court may affirm, reverse, or modify the decision of the board of appeals.

Supreme Court, U.S.
F I L E D
FEB 4 1997
CLERK

No. 96-1055

In The

Supreme Court of the United States

October Term, 1966

PARAGON PROPERTIES COMPANY,

Petitioner,

vs.

CITY OF NOVI,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Petitioner's taking claim, under any theory, was ripe for judicial review when Petitioner failed to obtain a final decision as to the use of its property from the Respondent?

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OPINIONS BELOW

The Michigan Supreme Court decision in this matter is reported at *Paragon Properties Co. v. City of Novi*, 452 Mich. 568, 550 N.W. 2d 772 (1996). The Order Denying Rehearing in the Michigan Supreme Court is found at 453 Mich. 1215, 554 N.W. 2d 900 (1996). The Michigan Court of Appeals' decision is reported at 206 Mich. App. 74, 520 N.W. 2d 344 (1994).

STATEMENT OF JURISDICTION

Respondent agrees with the Statement of Jurisdiction set forth in Petitioner's Petition for Writ of Certiorari.

ORDINANCE INVOLVED

In addition to the constitutional and statutory provisions cited by the Petitioner, Respondent asserts the City of Novi Zoning Ordinance § 3104 is also involved in this case which provides in pertinent part:

> 1. The Zoning Board of Appeals shall not have the power to alter or change the zoning district classification of any property, nor to make any change in the terms of this Ordinance but shall have the power to authorize a use in a zoning district in which it is not otherwise permitted, provided it is clearly shown that the land cannot be used for a zoned use, and shall be further empowered to act on those matters where this Ordinance provides for administrative review, interpretation, exception or special approval permit and to authorize a variance as defined in this Section and laws of the State of Michigan. Said powers include:

> b. **Variance.** To authorize, upon an appeal, a variance from the strict application of the provisions of this Ordinance whereby reason of exceptional narrowness, shallowness, shape or area of a specific piece of property at the time of enactment of this Ordinance or by reason of exceptional topographical conditions or other extraordinary or exceptional conditions of such property, the strict application of the regulations enacted would result in peculiar or exceptional practical difficulties to or exceptional undue hardship upon the owner of such property provided such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of this Ordinance. . . .

2. In consideration of all appeals and all proposed variations of this Ordinance, the Board shall before making any variations from the Ordinance in a specific case, first determine that the proposed variation will not impair an adequate supply of light and air to adjacent property, or unreasonably increase the congestion in public streets, or increase the danger of fire or endanger the public safety, or unreasonably diminish or impair established property values within the surrounding area, or in any other respect impair the public health, safety, comfort,

morals or welfare of the inhabitants of the City of Novi. . . .

STATEMENT OF THE CASE

A. Paragon Files Suit In Circuit Court

Petitioner, Paragon Properties Company (Paragon), filed a Complaint in the Oakland County Circuit Court, State of Michigan, on June 5, 1989 against Respondent, the City of Novi (City), alleging a taking of its property in violation of the United States and Michigan Constitutions seeking equitable relief and money damages. (Petitioner's App. D-4, D-7). On May 21, 1984, Paragon requested the City to rezone property owned by the Petitioner. Paragon owns approximately 75 acres located on the westerly boundary of the City at the intersection of Napier and Twelve Mile Roads. The current zoning at that time was R-1 and R-A wherein among other uses, the property was designated for single family residential use. Petitioner requested a rezoning to M-H so it could develop a mobile home park on said property.

To support its talking claim Paragon alleged the property had no economic potential for development under the current zoning. Paragon purchased the property in 1980, knowing the property was zoned for single family residential use, but hoped to obtain a rezoning of the property. In August, 1984 the City Council denied Paragon's rezoning request. As a result, Paragon filed an action in the Oakland County Circuit Court, State of Michigan against the City on January 11, 1985, case no. 85-288614 AZ. That case was ultimately dismissed without prejudice on February 9, 1989, and was refiled by Paragon on June 5, 1989. At page 3 of Paragon's Petition, Paragon states the suit was dismissed because the parties were engaged in further discussions to rezone the property. The availability of a

use variance was never discussed between representatives of Paragon and the City. While that is true, the City was under no affirmative obligation to suggest such a possibility.

Essentially, Paragon claimed the property, in a rural part of Novi, could not be economically developed, as zoned, because it was not served by a public sewer system; and allegedly the soil did not perk to allow the installation of septic fields to develop the property as zoned. Paragon alleged that all reasonable use of the land had been precluded. Paragon alleged that "As applied to the Property of Plaintiff, the zoning ordinance of the City of Novi is unreasonable, confiscatory, discriminatory, and it is unconstitutional and has deprived Plaintiff of its property in violation of the Due Process Clause of the Constitution of the State of Michigan and the United States of America". (Petitioner's App. D-7).

On June 21, 1989, an Answer and Affirmative Defenses were filed by the City. In the Affirmative Defenses the City asserted Paragon had failed to state a claim upon which relief could be granted for a deprivation of Paragon's constitutional rights. The City asserted that Paragon's taking claim under the Fifth and Fourteenth Amendments of the United States Constitution failed to state a claim when the State provided an adequate remedy at law. Further, the City asserted Paragon had received substantive due process as well as procedural due process with respect to its rezoning request. The City asserted no taking had occurred because the actions of the City were proper and constitutional. Lastly, the City reserved the right to raise any other affirmative defenses which became known to it throughout the course of discovery of these proceedings. Thereafter, the parties engaged in various discovery proceedings.

B. Circuit Court Denies The City's Motion For Partial Summary Judgment

On February 19, 1990, the City filed a Motion for Partial Summary Disposition asserting Paragon's taking claims, under the United States and Michigan Constitutions were not ripe for judicial review because a final decision regarding its use of the property had not been obtained from the City. The basis for said Motion, among other things, was, at the time, a recently released decision by the Michigan Supreme Court, *Electro-Tech v. Campbell Co.*, 433 Mich. 57, 445 N.W. 2d 61 (1989); embracing *Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 878 L. Ed. 2d 126 (1985).

In the Answer to the City's Motion filed by Paragon, Paragon claimed the City was barred pursuant to M.C.R. 2.111(F)(3), to assert the defense raised in the City's Motion. Paragon asserted the City's argument was an affirmative defense which had to be stated in a party's first responsive pleading. Paragon asserted the denial of its application for rezoning constituted a final decision from which Paragon was entitled to seek damages.

On March 28, 1990, the parties appeared before the Oakland County Circuit Court to present argument on the City's Motion. At the conclusion of said hearing, the Court agreed with Paragon finding the defense raised in the City's Motion was untimely; and, Paragon had received a final decision from the City. Further, Paragon was not required to apply for a variance with the City's zoning board of appeals. An Order Denying Defendant's Motion for Partial Summary Disposition was entered by the Oakland County Circuit Court on April 6, 1990. As a result, the City filed an Application for Leave to Appeal with the Michigan Court of Appeals. The Court of Appeals denied the City's Application for Leave to Appeal on May 25, 1990.

While the Application was pending, the City filed a Motion for Leave to File Amended Affirmative Defenses in the Circuit Court. On March 29, 1990, Paragon opposed the Motion. Oral argument on said Motion was held on June 20, 1990. At the conclusion, the Circuit Court granted the City the right to file amended affirmative defenses. An Order Granting Leave to the City to Amend its Affirmative Defenses was entered by the Oakland County Circuit Court on July 3, 1990.

C. Circuit Court Issues Judgment Declaring Zoning Ordinance As Applied To Paragon's Property Is An Unconstitutional Taking

On July 5, 1990, the parties appeared in the Oakland County Circuit Court for the purpose of a bench trial that lasted seven days. At the conclusion of said trial, the court set forth its opinion on July 17, 1990.

The court found Paragon had satisfied the burden of establishing the property would not perk; and therefore would not support any of the City's alternative suggestions, or proposals regarding the development of said property as zoned. The court held Paragon had been deprived of all use of the property. The court further stated the property had no value, other than its original purchase price, $2,000 per acre, as presently zoned. Therefore, the zoning was confiscatory. The court declared the zoning ordinance, *as it applied to the land in question*, to be unconstitutional, contrary to the City's master plan; and enjoined the City from enforcing the existing zoning classification to the subject property.

The court maintained continuing jurisdiction to allow Paragon to proceed with the development of its property as a mobile home park. It was further ordered said development could not conflict with the state wetlands or woodlands statutes. As

to damages, the court found the City had taken 35 acres of the 75 acres in question through its zoning.

On August 30, 1990, a Judgment was entered by the Oakland County Circuit Court, for the State of Michigan conforming with the Court's ruling on July 17, 1990. In said Judgment, the amount of damages totaled $198,930. Further, the City was ordered to pay Paragon's actual and reasonable attorney fees to be submitted to the court at a later date.

The City filed a timely Motion for Judgment Notwithstanding the Verdict/New Trial raising various arguments including the finality/ripeness doctrine. Paragon opposed the Motion. The court denied the City's Motion for Judgment Notwithstanding the Verdict/New Trial by an Order dated December 17, 1990. The City filed an appeal in the Michigan Court of Appeals and the Petitioner cross-appealed on several grounds.

D. Michigan Court Of Appeals Reverses Judgment On Ripeness Grounds

On April 7, 1994, the Michigan Court of Appeals issued its Opinion reversing the Oakland County Circuit Court Judgment entered against the City on August 30, 1990. In so doing the Court of Appeals stated:

> The dispositive issue is whether Novi's denial of Paragon's rezoning application constituted a final determination from which Paragon could seek redress in the circuit court. Of course, Paragon contends that Novi's denial was a final determination; Novi argues that Paragon was obliged to seek a zoning variance from the zoning board of appeals

and to bring a state inverse condemnation action before its constitutional claim was ripe. We agree with Novi.

Under Michigan law, the doctrine of finality requires a property owner to obtain a final decision from the governmental entity alleged to have unconstitutionally taken the property and also attempt to obtain just compensation through inverse condemnation. The purpose of the finality requirement is to ensure that there actually was a taking. *Electro-Tech, Inc. v. H. F. Campbell Co.*, 433 Mich. 57, 61; 445 N.W.2d 61 (1989), cert. den. 493 U.S. 1021 (1990); *Lake Angelo Associates v. White Lake Twp.*, 198 Mich. App. 65; 498 N.W. 2d 1 (1993).

We also reject Paragon's contention that Novi waived the defense of finality because it failed to raise it as an affirmative defense in its first responsive pleading. *Finality goes to subject matter jurisdiction and thus need not be listed as an affirmative defense. Pearson v Grand Blanc*, 961 F.2d 1211, 1214-1215 (CA 6, 1992); *Campbell v St. John Hosp.*, 434 Mich. 608, 616; 455 N.W.2d 695 (1990); *Grand Blanc Landfill, Inc. v. Swanson Environmental, Inc.*, 200 Mich. App. 642, 646; 505 N.W.2d 46 (1993), lv. pdg.

Finally, Paragon attempts to overcome the finality requirement by arguing that it would have been futile, as well as a measure taken in bad faith, to have sought a variance from

> the Zoning Board of Appeals. We disagree in light of the exceptional hardship exception that affords the Zoning Board of Appeals the opportunity to grant the variance regardless of Paragon's ability to otherwise qualify.
>
> Because we reverse the judgment on finality grounds, we do not reach or consider the other issues raised in this case by Novi in its direct appeal or Paragon in its cross-appeal.

(Emphasis added). *Paragon Properties Co. v. City of Novi*, 206 Mich. App. 74, 520 N.W. 2d 344 (1994).

Petitioner filed a Motion for Rehearing on April 28, 1994. The Michigan Court of Appeals denied the Motion on June 10, 1994.

E. Michigan Supreme Court Affirms The Michigan Court Of Appeals On Ripeness Grounds

Paragon filed an Application for Leave to Appeal with the Michigan Supreme Court, which was originally denied. However, on September 20, 1995, the Michigan Supreme Court granted Paragon's subsequent Motion for Reconsideration and granted leave to appeal at *Paragon Properties Co. v. City of Novi*, 450 Mich. 865, 550 N.W. 2d 772 (1995).

In the appeal before the Michigan Supreme Court, Paragon raised many arguments all of which essentially asserted the Michigan Court of Appeals erroneously applied the Michigan Supreme Court decision in *Electro-Tech, supra*. Paragon argued the City's zoning board of appeals had no authority to grant Paragon a use variance. Paragon argued the City Council had exclusive decision-making power relative to zoning matters, and

to allow the Zoning Board of Appeals to grant a use variance would in effect be a usurpation of the City Council's legislative function. Further, Paragon argued seeking a use variance would be futile when it would not qualify for one. Lastly, Paragon argued the finality/ripeness doctrine only applied to a just compensation taking claim. Paragon asserted the finality/ ripeness doctrine did not apply to taking claims based on an as applied substantive due process challenge under the Fourteenth Amendment.

Paragon argues at page 10 of its Petition the Michigan Supreme Court "opined that, although Paragon secured an unconditional denial of its rezoning request . . . Paragon should have sought a use variance from the Zoning Board of Appeals." The Michigan Supreme Court never stated Paragon had received an unconditional denial of its rezoning request. Instead, the Supreme Court stated "[W]hile the city council's denial of rezoning was certainly a decision, it is not a final decision under *Electro-Tech* because had Paragon petitioned for a land use variance, Paragon might have been eligible for alternative relief from the provisions of the Ordinance." (Petitioner's App., A-11).

REASONS FOR DENYING THE WRIT

As the Petitioner correctly states, an indispensable element of subject matter jurisdiction in federal court is the existence of a case or controversy. U.S. Const. art. III. Further, to effectuate a limitation on the judiciary over local land use regulations, in which a property owner claims a regulatory taking, this Court has adopted the finality/ripeness doctrine in *Williamson County, supra*. The Williamson finality doctrine was adopted by the Michigan Supreme Court in *Eletro-Tech, supra*. The Petitioner fails to remember that the courts, whether federal or state, can not invade the province of local government in its land use

regulations unless the regulations are clearly prohibited by law or constitution. Hence, the finality/ripeness doctrine recognizes that both federal and state courts must guard against violating the separation of powers doctrine and invade the province of local governments in regulating land usage within their boundaries. Zoning ordinances, combined with other mechanisms such as land use variances, enable local governments to more adeptly manage land within their jurisdictions. The zoning of land is a reasonable exercise of governmental police power and must be accomplished at the local level. The finality/ripeness doctrine allows this end to be accomplished without unnecessary interference by the judiciary.

The Petitioner asserts lower federal courts have struggled to apply the finality/ripeness doctrine in a consistent fashion. Further, the Petitioner asserts there has been confusion over the purpose and scope of the doctrine in the federal courts. Finally, Petitioner asserts this Court has recently granted a writ of certiorari in *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359 (9th Cir. 1996), *cert. granted,* 117 S. Ct. 293 (1996).

Although this Court has granted certiorari in *Suitum, supra*, the granting of certiorari does not mean this Court did so because it recognizes the need to clarify the manner in which *Williamson County* is applied by federal courts. The *Suitum* case has been involved in extensive litigation over a number of years involving unique facts and issues. Facts and issues not present in the instant matter. Specifically, the question of whether a property owner must transfer their "development rights" in a unique land use program, before an as applied taking claim is ripe for judicial review. Those issues are not present in this case. Further, there has been no confusion or conflict among the courts as to the purpose and/or scope of the doctrine. There is no need to clarify the manner in which *Williamson County* is applied by "federal courts" as the action involved in this case concerns a decision

of the Michigan Supreme Court, a decision which is consistent with this Court's decision in *Williamson County*. There is absolutely no conflict or confusion over the application of the *Williamson County* finality/ripeness doctrine, by lower federal courts, or the State of Michigan, which should induce this Court to grant certiorari in the instant matter.

I.

THE *WILLIAMSON COUNTY* RIPENESS DOCTRINE DOES NOT NEED CLARIFICATION AS THERE IS NO CONFLICT BETWEEN THE DECISION OF THE MICHIGAN SUPREME COURT AND DECISIONS OF THE SIXTH AND ELEVENTH CIRCUIT COURT OF APPEALS.

A. The Michigan Supreme Court Did Not Expand The *Williamson County* Ripeness Doctrine Contrary To The Decisions Of The Sixth And Eleventh Circuit Court Of Appeals.

At page 13 of Paragon's Petition, Paragon asserts the Michigan Supreme Court dismissed all of its constitutional claims, "including Paragon's non-taking substantive due process claim under the Fourteenth Amendment". To support this argument Paragon asserts the *Williamson County* decision rendered by this Court does not apply to non-taking substantive due process claims. Paragon's analysis of this Court's decision in *Williamson* is erroneous. In *Williamson*, this Court specifically stated:

> We turn to an analysis of respondent's claim under the due process theory that petitioners espouse. As noted, under that theory government regulation does not effect a

taking for which the Fifth Amendment requires just compensation; instead, regulation that goes so far that it has the same affect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment.

* * *

We need not pass upon the merits of petitioners' arguments, for even if viewed as a question of due process, respondent's claim is premature. Viewing a regulation that "goes too far" as an invalid exercise of the police power, rather than as a "taking" for which just compensation must be paid, does not resolve the difficult problem of how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. As we have noted, resolution of that question depends in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property. *No such decision had been made at the time respondent filed its §1983 action, because respondent failed to apply for variances from the regulations.*

> *In sum, respondent's claim is premature, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment.*

(Footnotes omitted). (Emphasis added). *Williamson*, 473 U.S. at 197,199, 200; 105 S. Ct. at 3122, 3123, 3124.

Thus, it is clear the finality/ripeness doctrine applies to taking claims under a just compensation and an as applied substantive due process claim.

At pages 15-16 of the Petition filed by Paragon, Paragon asserts the Sixth Circuit Court of Appeals held the very existence of an allegedly unlawful zoning action without more makes a substantive due process claim ripe for federal adjudication citing *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1215 (6th Cir. 1992). Paragon's analysis of the decision set forth in *Pearson, supra* is erroneous. The *Pearson* panel did not state that the very existence of an allegedly unlawful zoning ordinance, without more makes a substantive due process claim ripe for review. Instead, the *Pearson* panel noted that a prior panel of that court had recently held the existence of an allegedly unlawful zoning action, without more, makes a substantive due process claim ripe for federal adjudication; citing *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 894 (6th Cir. 1991). However, *Nasieroswki was a procedural due process* case.

In *Pearson* the court noted there are six type of federal zoning claims. *Pearson* listed those claims as: (1) just compensation taking claims; (2) due process taking claims; (3) arbitrary and capricious substantive due process claims; (4) equal protection; (5) procedural due process; and (6) First Amendment.

While it is true the Sixth Circuit Court of Appeals found *Pearson*'s as applied substantive due process claim to be ripe for judicial review, the court did so because the plaintiff in *Pearson* had met the strict ripeness standard enunciated by the Ninth Circuit Court of Appeals. The *Pearson* plaintiff had submitted an application for an alternative use. *Pearson* stated the Ninth Circuit has a strict ripeness requirement in non-taking zoning cases; which requires the landowner to not only submit one meaningful application, but also seek at least one variance, if that application is denied, before coming to federal court. *Harrington v. County of Sonoma*, 834 F.2d 1488, 1494-95 (9th Cir. 1987), *modified*, 857 F.2d 567, 569 (9th Cir. 1988). In the instant matter, Paragon merely requested a rezoning. It did not submit any site plan or seek a variance and was therefore premature in filing an as applied substantive due process challenge against the City. Finally, the Sixth Circuit said it was following the precedent set forth in *Nasierowski, supra*.

In *Nasierowski, supra*; the plaintiffs *made a procedural due process challenge* when the defendant city gave a conditional approval of a site plan requiring the plaintiff to improve public roads accessing the plaintiffs' proposed development. The *Nasierowski* plaintiffs *also applied for a variance from the requirements imposed on the site plan which was denied.* While the plaintiffs in *Nasierowski* were engaged in seeking a variance, the city council adopted a new city-wide master zoning plan which rezoned the plaintiffs' property placing greater restrictions on the plaintiffs' proposed development. The plaintiffs were at the point of obtaining final site plan approval, when the proposed new master plan was modified and a new zoning classification was applied to the plaintiffs' property, which would prohibit the plaintiffs from developing the property as planned. Without applying to the city's board of zoning appeals for a variance from the newly enacted zoning classification, Nasierowski commenced suit in federal district court. On appeal to the Sixth

Circuit, Nasierowski argued he was denied procedural due process when the city's master zoning plan was amended without providing him with notice and opportunity to be heard regarding the change.

In *Nasierowski*, the Sixth Circuit held the *Williamson* finality doctrine does not apply to procedural due process claims, because the injuries to the property owner accrue and attach immediately when the property owner has been denied notice and an opportunity to be heard; *i.e.*, procedural due process. Thus, the situation and claims presented in *Nasierowski* are clearly distinguishable from the instant matter. Further, the *Pearson* panel was mistaken when it found that *Nasierowski* stood for the proposition that the very existence of an allegedly unlawful zoning action, without more, makes a substantive due process claim ripe for adjudication. *Nasierowski* does not state that.

Paragon relies on the decision in *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990); claiming the Eleventh Circuit Court of Appeals has held the *Williamson* finality doctrine does not apply to an as-applied substantive due process challenges. Further, Paragon asserts there is a conflict between the decision in this case and the *Eide* case.

A careful review of the *Eide* decision reveals the Eleventh Circuit Court failed to follow its own precedent set in *Greenbriar Ltd. v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989). Further, the opinion itself is not applicable here when Paragon has never alleged a "*non-taking*" substantive due process claim. A careful review of Paragon's Complaint and the appellate briefs filed by the parties reveals Paragon has consistently claimed a taking of its property occurred entitling it to money damages when the City denied Paragon's rezoning request.

Utilizing the *Eide* reasoning in this case the remedy sought by Paragon evidences Paragon has consistently argued a taking of its property under the Fifth and Fourteenth Amendments seeking compensation; and, the ability to develop its property as a mobile home park. The property has never been developed because Paragon has been unable to obtain the necessary permits from the State of Michigan, even though the City had been enjoined from enforcing its ordinance until the Michigan Supreme Court denied Paragon's Motion for Reconsideration, October 7, 1996.

An as-applied substantive due process challenge claiming the governmental entity acted in an arbitrary and capricious manner essentially asserts there was no basis for denying the Petitioner's rezoning request. Yet, the reasons for the denial of the Petitioner's rezoning request were never explored or developed at the trial court level. Without exploring those reasons how could Paragon argue the decision not to rezone the property was arbitrary and capricious. Paragon essentially argued the decision to deny its rezoning request precluded Paragon from using its property. In other words, Paragon could not economically develop the property as zoned. Clearly, this allegation is a taking allegation and not merely a statement that the City was acting arbitrarily and capriciously.

The decision of the Michigan Supreme Court in this case is not in conflict with the decision of the Sixth Circuit Court of Appeals in *Pearson*. To the extent that the Michigan Supreme Court decision conflicts with that rendered in *Eide, supra*; Respondent asserts the decision in *Eide* is at best very confusing and should not be the basis for granting the Petition for Writ of Certiorari in this case.

In *Taylor Inv. Ltd. v. Upper Darby Twp.*, 983 F.2d 1285 (3rd Cir. 1993), *cert. denied,* 114 S. Ct. 304; 126 L. Ed. 2d 252 (1993),

the Third Circuit Court of Appeals held the *Williamson* finality doctrine applies to an as-applied substantive due process challenge to a land use regulation. In so holding, the court noted that to prevail on a substantive due process claim a plaintiff must have been deprived of a property interest because of arbitrary and capricious government action. Again, *Taylor* points out that the finality requirement for such a challenge is necessary to determine what property interest, and to what extent that property interest, has been taken. Paragon never asserted a "non-taking" substantive due process claim in this case.

B. The Michigan Supreme Court Decision In This Case Does Not Deprive Paragon Of A Right To Temporary Taking Damages, Contrary To The Fifth Amendment As Applied By This Court In *First English Evangelical Lutheran Church*.

In subsection A. of Paragon's Petition it claims it made a "non-taking" substantive due process argument that should not be subject to the *Williamson* finality doctrine. Yet, at subsection B. of its Petition it now claims the Michigan Supreme Court in this case deprived Paragon of its right to seek temporary taking damages contrary to the Fifth Amendment and this Court's holding in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

Paragon argues the Michigan Supreme Court decision in this case results in a situation where any person whose property cannot be developed under the existing zoning must first pursue a myriad of administrative appeals, including a variance application to a zoning board of appeals, and then an appeal to the Circuit Court. Further, Paragon asserts that neither the zoning board of appeals, nor a circuit court on appeal from a decision of the zoning board of appeals, has the authority to award damages under the Just Compensation Clause of the Fifth

Amendment, therefore it could never seek money damages for a temporary taking. What Paragon fails to remember is, although it would have had the right to appeal the zoning board of appeals' denial of a variance, by seeking a variance and having same be denied, at least Paragon would have received a final decision as to how its property could be used. Once that occurred its taking claim, temporary or otherwise, would be ripe for judicial review. Contrary to the assertions of Paragon the decision of the Michigan Supreme Court in this case in no way prevents property owners from seeking just compensation for temporary takings of their property.

The decision of the Michigan Supreme Court does not conflict with this Court's holding in *First English Evangelical Lutheran Church of Glendale.* In *First English, supra*, this Court found the plaintiff's claim was ripe for judicial review because the plaintiff had met the requirement that a state inverse condemnation action be filed. The second prong of the *Williamson* finality doctrine; *i.e.*, had the plaintiff received a final decision as to the use of its property was not at issue. In fact, all of the courts assumed *all* use of the plaintiff's property had been precluded by the land use regulation. In this case there was no such assumption. Again, Paragon fails to remember the basic premise behind the awarding of just compensation. That is, a property owner is entitled to just compensation for a temporary or permanent taking of *all use* of the property. In this case, the use of the Petitioner's property was never determined.

II.

THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE AS THE OHIO OPINION RELIED UPON BY THE PETITIONER IS DISTINGUISHABLE FROM THE INSTANT MATTER; THEREFORE THERE IS NO CONFLICT AMONG STATE COURTS REGARDING THE *WILLIAMSON* FINALITY DOCTRINE.

Paragon argues the Supreme Court of Ohio in *Karches v. City of Cincinnati*, 38 Ohio St. 3d 12, 526 N.E. 2d 1350 (1988) specifically rejected the *Williamson* finality doctrine on identical facts. First and foremost it should be noted this statement is completely untrue. The facts in *Karches* are completely distinguishable from the instant matter.

First, the property owned by the plaintiffs in *Karches* had been used by the plaintiffs for approximately six years, when the city adopted a new city-wide zoning proposal which changed the zoning classification of the plaintiffs' properties. Three years later, one of the plaintiffs discovered the zoning change and explored the possibility of having his property rezoned. However, no action or request for rezoning was taken by the plaintiff until eight years later, which was denied. Thereafter, the plaintiffs attempted to use their land for a permitted use under the city's zoning ordinance. Seventeen years after the initial change in zoning, the plaintiffs filed suit against the city alleging the zoning ordinance was an as applied unconstitutional taking of their property requiring just compensation. However, the plaintiffs dismissed the lawsuit without prejudice when the city assured the plaintiffs their problems with the use of their property would be settled by revisions to the zoning ordinance. The revisions did not help the plaintiffs and a second suit was filed against the city.

The Court of Appeals in *Karches, supra*, held the city had not reached a final definitive position because the plaintiffs had not, *on the basis of a specific proposed use,* petitioned for a rezoning or applied for a building permit. Without a refusal by the city to allow a specific use, the Court of Appeals for Ohio found no definitive position as to the use of the property had been taken by the city. The Ohio Supreme Court disagreed with the Court of Appeals. The Ohio Supreme Court found the denial of a specific proposed use was not necessary to find that the city had taken a final definitive position on the use of the property to satisfy the ripeness test. In so holding, the Supreme Court of Ohio specifically recognized that pursuant to the *state law* of Ohio the constitutionality of a zoning ordinance may be attacked in two ways. Further, pursuant to state statute the ripeness determination is not applicable to an action for declaratory judgment. Finally, and most importantly, *Ohio law precluded the granting of a variance for a use contrary to the use regulations of the applicable zoning district.* A situation, that is not present in this case under Michigan law.

Thus, a careful review of the decision in this matter in comparison to the Ohio case clearly reveals the two are not the same. There is no conflict requiring this Court to expend its time and energy and grant the Petitioner's Petition for Writ of Certiorari in this case.

CONCLUSION

Paragon Properties Company never received a final definitive decision regarding the use of its property from the Respondent, the City of Novi. Pursuant to this Court's decision in *Williamson*, Paragon's taking claim under any theory was not ripe for judicial review. Paragon's allegation that it asserted a "non-taking" substantive due process claim is meritless. That claim was never made in the courts below. Paragon never

developed that theory; and, the remedy Paragon sought clearly establishes Paragon attempted to assert a taking claim against the City of Novi.

The Michigan Supreme Court did not expand the *Williamson County* finality doctrine beyond its intended scope; nor has it deprived Michigan landowners of constitutionally protected property rights by its decision in this case.

Finally, the granting of a Writ of Certiorari in the case of *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 293 (1996), does not establish this Court has "already recognized the significant need to resolve the uncertainty and inconsistent application of *Williamson County*". The decision in this matter is consistent with other decisions involving the issues at hand both at the federal and state court levels.

The City of Novi respectfully prays this Court deny Paragon's Petition for Writ of Certiorari. Alternatively, the City of Novi prays this Court will summarily affirm the decision of the Michigan Supreme Court.

Respectfully submitted,

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